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**TRANSCRIPT OF RECORD**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1944-45**

**No. 1926 44**

**THE UNITED STATES OF AMERICA, APPELLANT**

**vs.**

**AMERICAN UNION TRANSPORT, INC., D. C. ANDREWS  
& CO., INC., ATLANTIC FORWARDING CO., INC.,  
ET AL.**

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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

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**FILED MARCH 8, 1945**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1026

THE UNITED STATES OF AMERICA, APPELLANT

vs.

AMERICAN UNION TRANSPORT, INC., D. C. ANDREWS  
& CO., INC., ATLANTIC FORWARDING CO., INC.,  
ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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1 In United States District Court, Southern District  
of New York

AMERICAN UNION TRANSPORT, INC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

*Petition*

Filed Feb. 11, 1943

To: The Honorable the Judges of the District Court of the United States, for the Southern District of New York:

The American Union Transport, Inc., and other plaintiffs hereinafter more fully described, bring this, their petition, against the United States of America, and hereby sue to enjoin, set aside, suspend, and annul two certain orders, as hereinafter set forth, of the United States Maritime Commission (hereinafter called the "Commission"), and in support of said petition and prayer for injunctive relief, plaintiffs complain and say:

I

The plaintiffs are the following named:

(a) corporations of the State of New York, having their principal office and place of business within the Southern District of New York: American Union Transport, Inc., D. C. Andrews & Co., Inc., Atlantic Forwarding Co., Inc., Baker, Irons & Dockstader, Inc., Baltic Shipping Co., Inc., J. E. Bernard & Co., Inc., Bluefries-New York, Inc., A. P. Cofod & Co., Inc., Colony Shipping Co., Inc., Thos. Cook & Son-Wagons Lits, Inc., M. J. Corbett & Co., Inc., A. J. DeMay & Co., Inc., B. F. Downing & Co., Inc., Dumont Shipping Co., Inc., Byson Shipping Co., Inc., John H. Faunce New York, Inc., Freedman & Slater, Inc., The Gallie Corporation, P. A. Gaynar & Co., Inc., Gerhard & Hey Co.,  
2 Inc., Globe Shipping Co., Inc., H. A. Gogarty, Inc., J. W. Hampton, Jr., & Co., Inc., W. Heimann International Transportation Service, Inc., E. Hennigson Co., Inc., Hensel, Bruckmann & Lorbacher, Inc., Hudson Shipping Co., Inc., John H. Hunter & Son, Inc., Inge & Company, Inc., Inter-Maritime Forwarding Co., Inc., International Forwarding Co., Inc., Karr, Ellis & Co., Inc., Lansen-Naeve Corp., Lunham & Reeve, Inc., Major Forwarding Co., Inc., Marks & Coyle, Inc., Meadows Wye & Co., Inc., Mohegan International Corporation, The W. P. Neth Co., Inc., New Netherland Co., Inc., A. E. Nydegger & Co., Inc., Norton &

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Ellis of New York, Inc., Pitt & Scott Corporation, Premier Shipping Co., Inc., Rohner, Gehrig & Co., Inc., H. W. St. John & Company, R. J. Saunders & Co., Inc., W. O. Smith & Co., Inc., Milton Snedeker Corporation, United Shipping Corporation, Universal Transcontinental Corporation, Van Oppen & Co., Inc., Wedemann & Godknecht, Inc., Daniel F. Young, Inc.

(b) foreign corporations: American Shipping Co., Inc., a corporation organized and existing under and by virtue of the laws of the State of Illinois; Davies, Turner & Co., a corporation organized and existing under and by virtue of the laws of the State of New Jersey; F. E. Wallace & Co., Inc., a corporation organized and existing under and by virtue of the laws of the State of New Jersey; Intercontinental Forwarding, Inc., a corporation organized and existing under and by virtue of the laws of the State of Delaware; Judson, Sheldon Corporation, a corporation organized and existing under and by virtue of the laws of the State of Delaware;

3 (c) copartnerships: Patrick A. Cavanaugh and Elizabeth L. Cavanaugh, copartners, doing business under the firm name and style of Cavanaugh Shipping Company; Ewald Kersten and Fred L. Wolf, copartners, doing business under the firm name and style of Kersten Shipping Agency; J. C. Maron, J. E. Krebs, and C. Schaefer, copartners, doing business under the firm name and style of Maron and Schaefer;

(d) individuals: H. Zachary Bernstein, doing business under the registered trade name of H. Z. Bernstein Company; F. J. Errion and M. L. Errion, individuals, doing business under the registered trade name of Errion Company; Kingston Grodwohl, doing business under the registered trade name of L. Grodwohl & Son; Ernest Tornabell;

II

All of the plaintiffs are engaged in the business of shippers' agents and freight brokers in the terminal area commonly known as the Port of New York, and are engaged in arranging, in the usual course of such business, and as agents for others, for insurance, cartage, warehousing, and other services incidental to and including the affreightment of merchandise consigned to and from points within the United States, from and to points outside thereof; the services of plaintiffs and their responsibilities to shippers in connection therewith being confined, in the ordinary course of business, to the terminal area, aforesaid, and plaintiffs do not assume responsibility for delivery thereof at destinations;

4 the transportation and affreightment of the said merchan-

dise taking place partly within and partly without the United States. The plaintiffs are not persons subject to the Shipping Act of 1916 and the various acts amendatory thereof (Title 46, U.S. Code, Chapter 23).

### III

This suit is brought under the provisions of Title 28, Sections 41 (28), 43-48 of the United States Code, which confers on the District Courts of the United States jurisdiction of suits to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission; and Title 46, Section 830 of the United States Code, which provides that the venue and procedure in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the United States Maritime Commission shall be the same as suits in regard to orders of the Interstate Commerce Commission; and further providing that such suits may be maintained in any District Court having jurisdiction of the parties. The venue is laid in the Southern District of New York, pursuant to such section.

The orders of the Commission herein sought to be enjoined, set aside, and suspended, were made in a proceeding instituted upon the Commission's own motion, and not upon the petition of the parties. The venue is laid in the Southern District of New York. The plaintiffs enumerated in paragraph I (a) hereof each have their principal offices and places of business in the Southern District of New York.

### IV

The proceeding before the Commission in which the orders herein complained of were made was a general investigation instituted by the Commission on its own motion, designated 5 as "Port of New York Freight Forwarders Investigation,"

Docket No. 621. A large number of persons, including the plaintiffs herein, who had never previously been alleged or construed to be within the jurisdiction of the Commission, were named respondents in said general investigation. A true and correct copy of the order of the Commission, instituting said general investigation, and dated August 21, 1942, is hereto annexed, marked "A," and made a part hereof; and copies of the Commission's supplemental orders, adding and eliminating respondents in said proceeding, dated respectively September 22, 1942, December 1, 1942, and December 8, 1942, are hereto annexed, marked "A-1," "A-2," and "A-3" and made a part hereof, as though fully set forth at length.

## V

The said order dated August 21, 1942 (Exhibit A hereto) recites that a certain defunct corporation (not a party to this action), described as "Foreign Freight Contractors, Inc.":

(1) " \* \* \* issues contracts under guise of bills of lading, although not a carrier purports to establish freight rates; and engages in other acts and practices (not therein specified) with respect to contracts \* \* \*; and the method of assessing and collecting its charges \* \* \* which appear to be in violation of Section 17 of the Shipping Act of 1916, as amended;"

and

(2) " \* \* \* that the public interest requires a general inquiry to determine the extent of the existence of the said practices (without specifying the same) among all other forwarders \* \* \* subject to said Act, and the lawfulness of said practices under Section 17 thereof;"

and upon such recitals:

"It is ordered, That the Commission upon its own motion and without formal pleading enter upon an investigation concerning the lawfulness of the rules, regulations, practices and operations of said forwarders named herein, with a view toward making such order or orders or taking such other action in the premises as may be warranted by the record."

It was further provided in the said order that such investigation be assigned for hearing at such times and places as the Commission may hereafter direct.

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## VI

Thereafter the Commission circulated to the respondents named in the said proceeding, including the plaintiffs herein, a questionnaire, copy of which is hereto annexed, marked "C," and made a part hereof, which said questionnaire was, on information and belief, thereafter answered and filed with the Commission. The said questionnaire, among other things, propounded an interrogatory to these plaintiffs in the following language:

"Do you carry on the business of forwarding in connection with common carriers by water in foreign commerce?"

The plaintiffs, without knowledge of the import of the said question or of the kind or nature of the business which it was necessary to carry on, or the character of relationship with a common carrier by water in foreign commerce, which it was neces-

sary to maintain, in order to fall within the said definition, answered the question in the affirmative. The affirmative answers made by the plaintiffs to the said question were erroneous.

## VII

The Commission thereafter, on December 9th and 10, 1942, held hearings in the City of New York, in said investigation, designated by it as Docket No. 621, and offered in evidence the aforesaid questionnaires referred to in paragraph VI hereof, which were then and there accepted by the presiding examiner. Under the provisions of Section 1.07 (d) of the Rules of Procedure of the Commission, the said questionnaires and the confidential information therein contained, became subject to public inspection, and the Commission's examiner ruled accordingly.

## VIII

On December 10, 1942, the aforesaid hearing was adjourned sine die, upon motion of the attorney for the Commission, upon his statement to the presiding examiner that he had then presented all of the testimony he was able to present.

Thereafter the said attorney for the Commission, caused 7 a certain additional questionnaire, prepared by him and entitled in the aforesaid investigation Docket No. 621, to be delivered to certain of the plaintiffs herein and thereupon demanded that the same be answered and returned to the Commission to be used by him in preparation for further public hearings and to be offered in evidence therat, in such manner that the confidential matter therein contained relating to the private business of American exporters and shippers passing through the Port of New York, would be made known to their domestic and foreign competitors.

## IX

On January 14, 1943, the Commission, on its own motion, entered its further order under the provisions of Section 21 of the Shipping Act (Title 46, Section 820 U. S. Code), annexing a copy of the aforesaid questionnaire, with the docket number and title thereon deleted, and making response thereto by each of the persons mentioned therein mandatory within a period of thirty days, elapsing February 13, 1943, under penalty of being fined \$100 per day each for every day of default, as provided in said section.

A copy of the said order is hereto annexed, marked "B," and made a part hereof. It provides in part that the persons named in the appendix thereto be:

(a) " \* \* \* required to file with the Commission, at its office at 45 Broadway, New York, N. Y., a report of all information as set forth in the form hereto attached and marked Exhibit 'A,' said report to be a true, accurate, and complete record of all individual forwarding transactions taken from their books, records, and documents billed during January and February, 1940; June and July, 1941; and November and December, 1942;" and

(b) that it be "verified before a notary and \* \* \* filed as aforesaid within thirty days of this order \* \* \*"

Upon information and belief, the said order (Exhibit B hereto) was served on eighty-five persons, firms, and corporations, and the aggregate daily penalties on default in answering  
8 is \$8,500.

## X

Plaintiffs and each of them allege that the said order of the Commission dated August 21, 1942 (Exhibit A hereto) is unlawful and void, exceeds the regulatory powers of the Commission, and is arbitrary and capricious in that:

A. The plaintiffs herein (by the Commission designated as "respondents" in said proceeding) are not "other persons subject to this Act," to wit: the Shipping Act of 1916 (Title 46, Chapter 23, U. S. Code); not being persons engaged in or carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water, as defined in Sections 1 and 17 of the Shipping Act of 1916 (Title 46, Sections 801 and 816, U. S. Code); and are not subject to the jurisdiction nor required to respond to the orders of the Maritime Commission of the United States.

B. That the recital and finding of the Commission in the said order (Exhibit A hereto) that it appears "That each of the persons named in Appendix A herein carry on the business of forwarding in foreign commerce and that each of them is an 'other person subject to this Act,'" is arbitrary and capricious, there being no evidence to sustain such finding before the Commission on August 21, 1942, when the said order (Exhibit A hereto) was made.

C. By the terms of the order, the Commission undertakes, upon its own motion, to conduct a general inquiry in "the public interest" to determine whether certain unspecified and undefined practices exist among the respondents and if said practices do exist, the "lawfulness" thereof. It is acting "without formal pleading" and without complaint or allegation by it or any other person of a violation of the Shipping Act of 1916 (Title 46, Chapter 23, U. S. Code). There is no allegation of

any specific matter which might be made the subject of a complaint. The Commission is without power to conduct general investigations in the public interest, without complaint or formal pleading, being limited to the investigation of violations of the Act, alleged by it or others under the provisions of Section 22, 23, 27 thereof (Title 46, Sections 821, 822, 826 U. S. Code); and the investigation initiated by said order is an unlawful assumption of jurisdiction and authority by it.

D. By its terms the order provides for an investigation into the rates and charges of the respondents named therein, including the plaintiffs, and the method of assessing and collecting same. The Commission has no authority or power of regulation over the rates and charges of "other persons" subject to the Shipping Act of 1916, under Section 17 thereof (Title 46, Section 816, U. S. Code), and its attempt to inquire into them is an unlawful assumption of jurisdiction and authority by it.

E. By its terms, the investigation initiated thereby is in part (1) for the purpose of issuing an order of the Commission based on such investigation; and, in part, (2) for the purpose of "taking such other action in the premises as may be warranted by the record." The Commission is without authority, upon the conclusion of an investigation to take any action, except to state its conclusions and decisions and enter an order thereon, within the limits of its powers, and the said investigation is unlawful to the extent that it exceeds such purpose.

F. That the investigation initiated thereby includes within its scope an inquiry into the contracts made by the plaintiffs, as alleged in paragraph II, relative to the transportation of goods from and to points within the United States to and from points outside thereof, which transportation, insofar as it takes place within the United States is within the exclusive jurisdiction of the Interstate Commerce Commission, under the Interstate Commerce Act (Title 49, Section 1002 (a) (6) U. S. Code), and the Maritime Commission is denied power or jurisdiction over such transportation (Title 46, Section 832, U. S. Code).

## XI

Plaintiffs and each of them allege that they are not engaged in foreign commerce, and are not constitutionally subject to regulation by the Congress, under the provisions of Article I, Section 8 of the Constitution of the United States.

## XII

The plaintiffs and each of them allege that the order of the Commission dated January 14, 1943 (Exhibit B hereto) is un-

lawful and void, exceeds the regulatory powers of the Commission, and is arbitrary and capricious, for the following reasons:

A. The persons to whom the said order was directed are not "other persons subject to this Act," to wit: The Shipping Act of 1916 (Title 46, Chapter 23, U. S. Code) as more fully set forth in paragraph X A hereof.

B. By its terms, the order relates in part to transportation entirely within the United States and subject to the exclusive jurisdiction of the Interstate Commerce Commission, as more fully set forth in paragraph X F hereof.

C. It is not intended to inform the Commission, within its lawful powers of facts to which it is entitled in the administration of the Shipping Act, but is intended to perform the office of 11 an unlimited and unrestricted bill of discovery and inspection of plaintiffs' books and papers, in the investigation, Docket No. 621, which inspection is unauthorized by the Shipping Act (Title 46, Section 826, U. S. Code).

D. It requires a disclosure, without the consent of the shippers and consignees thereof, of information concerning the nature, kind, quantity, destination, consignee, and routing of property tendered and delivered to common carriers in foreign commerce at the Port of New York, to the detriment of and prejudice of such shippers and in violation of Section 20 of the Shipping Act of 1916 (Title 46, Section 286, U. S. Code).

E. It requires information from plaintiffs' books and records, to wit: their charges to customers, unrelated to any matter which the Commission is entitled, under the Constitution of the United States, or the law, to investigate, or concerning which it may require plaintiffs to report. The Commission has no power of regulation over the rates and charges of "other persons" subject to the Shipping Act of 1916; and the order constitutes an unreasonable search and seizure of plaintiffs' papers, in violation of Amendment IV to the Constitution of the United States.

F. It does not require the plaintiffs to furnish a periodical or special report within the meaning of Section 21 of the Shipping Act of 1916, but requires a detailed analysis of facts not completely shown in their books and records, over an excessively long period of time, which facts can only be compiled at great expense and which will have the effect of imposing upon plaintiffs an unauthorized penalty, and they will suffer irreparable injury and damage for which there is no remedy at law.

G. That the period of time limited therein is unreasonably short for plaintiffs to compile the information and prepare the forms to comply therewith. It is impossible for plaintiffs to comply with said order within the time limited.

H. It does not set forth any definite requirements for compliance therewith and is so indefinite and uncertain in its terms that plaintiffs are and will continue to be unable to determine what answers they must give in order to comply with said order. The order contains no instructions and does not, either by definition or application to particular situations, inform plaintiffs what is meant by the various questions, although its effect will be to make them subject to heavy penalties provided in the Shipping Act if they fail to comply therewith.

### XIII

Plaintiffs further allege that said order (Exhibit B hereto) is unlawful and void in that:

A. A number of plaintiffs herein are and have been for some time past engaged in arranging for the affreightment and transportation of merchandise and munitions of war consigned to certain foreign countries, the defense of which the President has deemed vital to the defense of the United States as provided by law (Title 22, Section 412, U. S. Code). The said order requires that plaintiffs furnish and disclose information concerning the said shipments, to wit: the name and address of the shipper, the nature of the shipment, the marks thereon, the name of the line, the date and number of the bill of lading and details thereof. The said information when so furnished will be offered in evidence and will be subject to public inspection. Plaintiffs are advised and verily believe that they will thereby, in time of war, and with reason to believe it will be used to the injury of the United States, aid, in transmitting to enemy citizens, information relating to the National Defense, in violation of Title 50, Sections 31 and 1332, U. S. Code. Plaintiffs aver, upon information and belief, that some of the said shipments are now in transit upon the high seas.

B. The said order (Exhibit B thereto) was issued by the Commission on January 14, 1943, and the Commission seeks thereby to collect information upon identical items from ten or more persons, other than federal employees. Upon information and belief, prior thereto and prior to the adoption of the form of questionnaire annexed to said order, the Commission failed and neglected to submit the same to the Director of the Budget and obtain his statement that he did not disapprove it. The said order and questionnaire thereto annexed have been unlawfully promulgated by the Commission in violation of the Federal Reports Act, approved December 24, 1942, Section 5 thereof (Public Law 83, 77th Congress, Chapter 811, Second Session), and plaintiffs are not required to respond thereto.

## XIV

Plaintiffs and each of them allege as to both of the aforesaid orders (Exhibits A and B hereto) that should they be required to obey the same, even if said order should later be set aside as unlawful, they would be forced publicly to disclose valuable private information concerning their own business and the private and confidential business and affairs of their customers, to their own and the said customers' great prejudice and damage; they would be required to expend large sums of money collecting information to answer the questions propounded by the order of January 14, 1943 (Exhibit B hereto); they would be required to neglect their business affairs for long periods of time; from all of which plaintiffs would suffer irreparable injury and damage for which there is no remedy at law. Plaintiffs, although they

believe and are advised by counsel that the said orders  
14 are unlawful and void, may not, nevertheless, safely disregard the same, for if the said order should thereafter be held valid, plaintiffs and each of them would be subject to the heavy penalties of \$100 per day, for each day of violation, as provided in the Shipping Act of 1916.

## XV

Each of the plaintiffs enumerated in paragraphs I (c) and (d) hereof allege that the said order (Exhibit B hereto) constitutes an unreasonable search and seizure of their papers and effects and compels them to be witnesses against themselves in a criminal case, in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

All of the matters herein alleged, plaintiffs and each of them offer to prove.

Wherefore, plaintiffs, being without adequate remedy at law, respectfully pray:

First. That upon the filing of this petition, the Presiding Judge of this Court shall call to his assistance in the hearing and determination of this cause, two other Judges, of whom at least one shall be a Circuit Judge.

Second. That process may issue against the defendant, the United States of America:

Third. That after not less than five days' notice to the United States Maritime Commission and to the Attorney General of the United States, as provided by law, a hearing shall be held, and an interlocutory injunction be issued, staying and suspending the said orders of the United States Maritime Commission;

Fourth. That upon final hearing of this case, a permanent injunction shall be issued decreeing that said orders of the Com-

mission are null and void, and are set aside, suspended, and  
 15 annulled, and that their enforcement, execution, and operation shall forever be enjoined, and that the United States shall forever be restrained from taking any steps, or instituting, or further prosecuting any proceeding to enforce the said orders.

Fifth. That this Court shall grant to the plaintiffs such other and further relief as by it may be deemed proper in the premises.

Respectfully submitted,

HAROLD L. ALLEN,

Harold L. Allen,

*Solicitor for Plaintiffs, Office & Post Office Address: No.  
70 Pine Street, Borough of Manhattan, City of New  
York.*

Dated New York, February 10, 1943.

16 [Duly sworn to by Herbert A. Byrne; jurat omitted in printing.]

17 Exhibit A to petition

#### ORDER

At a Session of the United States Maritime Commission, held at its office in Washington, D. C., on the 21st day of August, A. D. 1942

No. 621

#### PORT OF NEW YORK FREIGHT FORWARDER INVESTIGATION

It appearing, That each of the persons named in Appendix A herein carry on the business of forwarding in foreign commerce and that each of them is an "other person subject to this Act" within the meaning of that term as used in sections 1 and 17 of the Shipping Act, 1916, as amended;

It further appearing, from information before the Commission that Foreign Freight Contractors, Inc., in connection with the receiving, handling, storing, or delivery of cargo and freight in foreign commerce, issues contracts under guise of bills of lading, although not a carrier, purports to establish freight rates; and engages in other acts and practices with respect to contracts it makes with shippers and the method of assessing and collecting its charges, all of which appear to be in violation of section 17 of the Shipping Act, 1916, as amended; and

It further appearing, That the public interest requires a general inquiry to determine the extent of the existence of the said practices among all other forwarders in the port of New York subject

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to said Act, and the lawfulness of said practices under section 17 thereof:

It is ordered, That the Commission upon its own motion and without formal pleading enter upon an investigation concerning the lawfulness of the rules, regulations, practices, and operations of said forwarders named herein, with a view toward making such order or orders or taking such other action in the premises as may be warranted by the record.

18 It is further ordered, That all forwarders named in Appendix A herein be, and they are hereby, made respondents in this proceeding.

It is further ordered, That a copy of this order be served upon each of said respondents; and

It is further ordered, That this proceeding be assigned for hearing at such times and places as the Commission may hereafter direct.

By the Commission.

[SEAL]

(Sgd.) W. C. PEET, JR.

Secretary.

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Appendix A

Allen, John D.	Brauner & Co.
America Bluefriesvrem Inc.	Bridgette & Co., Inc.
American Despatch Agency.	Broderick & Co., Edw. P.
American Express Co.	Brown & Reese.
American Shipping Co.	Bruemmer & Ackerman.
American Union Transport Co.	Burdett, Inc., Daniel H.
Andrews, D. C.	Bryant & Heffernan, Inc.
Asche & Co., Inc., Chas. H.	Byrnes & Lowrey.
Atlantic Forwarding Co., Inc.	Caldwell & Co., Inc.
Atlas Forwarding Co.	Carlsen, H. R.
Austin Baldwin & Company.	Carter & Caulfield.
Baker, Irons & Dockstader, Inc.	Carter Shipping Service, L. M.
Bane & Co., William.	Carney, M. J.
Baltic Shipping Co.	Cavanaugh Shipping Co.
Barr Shipping Co.	Chelsea Forwarding Co.
Behring Co., P. R.	Coford, A. F.
Benkhart & Co., F. J.	Colony Shipping Co., Inc.
Bernard & Co., Inc., J. E.	Comstock & Theakston, Inc.
Berrier & Co., A. V.	Consmiller, Inc., L. A.
Bernstein, H. Z.	Cook & Sons, Thos. Wagons Ltd., Inc.
Black & Geddes	Copeland Shipping Inc.
Block & Co., John.	Copex Co., Inc.
Bluefries, New York, Inc.	Corbett & Co., M. J.
Bolton & Mitchell, Inc.	Cox & Fahner.
Bowen, A. E.	

- Davies, Turner & Co.  
 Dearborn & Co.  
 DeMay & Co., Inc., A. J.  
 D. L. & W. R. R.  
 Doherty, George F.  
 Dorf & Co., Inc., H. S.  
 Downing & Co., Inc., R. F.  
 Draeger Shipping Co., Inc.  
 Drew Shipping Co.  
 Dumont Shipping Co., Inc.  
 Dunlap, Alpers & Mott.  
 Dyson Shipping Co., Inc.  
 Eagle Commercial Corp.  
 Eberlein, J. G.  
 Errion Co.  
 Excel Shipping Co., Inc.  
 Export-Import Services, Inc.  
 Farris & Co., Inc., M.  
 Faunce Inc., John H.  
 Foreign Shipping Co., Inc.  
 Franklin & Co.  
 Freedman & Slater, Inc.  
 Freighting Corp. of America.  
 Fulton Freight Forwarding Co.  
 Gallagher & Asche, Inc.  
 Gallie Corporation.  
 Gaskell, Fred P. Co., Inc.  
 Gavin, J. J.  
 Gaynor & Co., Inc., P. A.  
 Gehard & Hey Co., Inc.  
 General Shipping & Trading Co.  
 General Transport Co., Inc.  
 Gertzen, Kerer Co., Inc.  
 Globe Shipping Co., Inc.  
 Godwins Samuel & Sons.  
 Gogarty, H. A. Inc.  
 Gonrand Shipping Co., Inc.  
 Grant & Co., Inc., C. S.  
 Gray, R. M., Inc.  
 Greene, R. L.  
 Grodwohl, G. & Son.  
 Hampton, J. W. Jr., & Co., Inc.  
 Happel, Charles.  
 Hayes & Streeter.  
 Hayden & Co., C. A.  
 Hemmeworth-Kerner, Corp.  
 Heiman W. International Transportation Service, Inc.  
 Henjes, Frederick Jr., Inc.  
 Hennington, E. Co., Inc.  
 Hensel Bruckmann & Lorbach, Inc.  
 Hill, F. Murray.  
 Hilton & Son.  
 Hirschbach & Smith, Inc.  
 Holt & Co., C. J.  
 Hudson Forwarding & Shipping Co.  
 Hunter & Son, Inc.  
 Hunter, T. T.  
 Hurley, Richard J.  
 Independent Forwarding Co.  
 Inge & Co., Inc.  
 Inter-Maritime Forwarding Co.  
 International Forwarding Co.  
 Jarrett & Willenbacher.  
 Judson Sheldon Corp.  
 Karr, Ellis & Co., Inc.  
 Keating & Co., Inc., W. R.  
 Keer, Maurer & Co., Inc.  
 Kersten Shipping Agency.  
 Kilroy, John F.  
 Kraemer, F. L. & Co.  
 Kramer & Hauser.  
 Lambert & Barrows.  
 20 Lansen-Naeve, Corp.  
 Leading Forwarders Inc.  
 Leonhardt & Bush.  
 Lippelgoes, George Co.  
 Lo Curto & Funk.  
 Love, E. C.  
 Luigi Serra, Inc.  
 Lunham & Moore International Corp.  
 Lunham & Reeve, Inc.

- Maguire, Philip Co.  
 Majestic Shipping & Forwarding Co.  
 Major Forwarding Co.  
 Markland Landau Co.  
 Marks & Coyle Inc.  
 Marks, Ernest E.  
 Maron & Schaefer.  
 Marti, F. & Co., Inc.  
 Masiller & Co.  
 Massie & Co.  
 Massie & Co., Inc.  
 Masters & Co., J. W.  
 McGrath, & Go., T. J.  
 Meadows, Wye & Co., Inc.  
 Michelson & Sternberg.  
 Mohegan International Corp.  
 Moody & Co., H. E.  
 Morris, A. J.  
 Moritz, Leonard W. & Co.  
 Munn & Jenkins.  
 Murray & Co., A. J.  
 Murphy J. J. & Co.  
 Nelson Fred O. & Co., Inc.  
 Neth, W. P. & Co., Inc.  
 New Netherland Co., Inc.  
 Niebrugge & Day Inc.  
 North American Forwarding Co.  
 Norton & Ellis of New York Inc.  
 N. Y. & Overseas Shipping Co.  
 Nydegger & Co., A. E.  
 Oceans Shipping Co., Inc.  
 Old Colony Forwarding Co.  
 Overton & Co.  
 Pacific & Atlantic Shippers Association.  
 Paragon Forwarding Company  
 Pearson & Co.  
 Perry, Ryer & Co.  
 Person & Weidhorn.  
 Peterson, C. E.  
 Phoenix Shipping.  
 Pitt & Scott Corporation.  
 Pomerance, S. H. Co., Inc.  
 Powell, C. H. Co.  
 Premier Shipping Co.  
 Puerto Rico Shippers Service.  
 Redde Forwarding Co., Inc.  
 Reliance Shipping Service.  
 Reynolds, J. L. Freight Corp.  
 Rex & Reynolds.  
 Richards Shipping Co.  
 Rietman-Pilcer Co.  
 Robinson, H. W. & Co.  
 Rogers, I. F.  
 Rogers, John O.  
 Rohner, Gehrig & Co.  
 Russpaden, C. F. & Co.  
 Ryder, C. C. & Co.  
 Santos, E. L. & Co.  
 Saunders, R. J. & Co., Inc.  
 Schneider Bros. Co., Inc.  
 Schmidt, Pritchard & Co., Inc.  
 Seven Seas Mercantile Transportation Co., Inc.  
 Shippers Storage Co., Inc.  
 Shore, John J.  
 Smith, Theodore B. & Co.  
 Smith, W. O. & Co., Inc.  
 Snedeker, Milton Corp.  
 Storn, Steiner & Co.  
 S. John, H. W. & Co.  
 Taub, Hummel & Schnall, Inc.  
 Thomas & Pierson, Inc.  
 Timm, Charles H.  
 Titan Shipping Co., Inc.  
 Tornabell, Ernest.  
 Transatlantic Shipping Agency.  
 Tranship, Inc.  
 Triad Shipping Co.  
 United Shipping Corporation.  
 United States Forwarding Company.  
 United States Freight Co.  
 Universal Transcontinental Corp.  
 Vandergrift & Co.  
 Van Oppen & Co., Inc.

Victory Shipping Co.	Willis & Cupitt.
Wallace, F. E. & Co., Inc.	Wilson, A. S.
Ward, James E. & Co.	Wood, J. B.
Webbal Service.	Wynne, Thomas J.
Wedemann & Godnecht, Inc.	Young, Daniel P. Inc.
Wehling, R. C. & Co.	Young, William G.
Weiss Forwarding Co.	Foreign Freight Contractors,
Werckle & Calgano.	Inc.
Whitehall Shipping Co.	

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*Exhibit A-I to petition***SUPPLEMENTAL ORDER**

At a Session of the United States Maritime Commission, held at its office in Washington, D. C., on the 22nd day of September,  
 A. D. 1942

**POR T OF NEW YORK FREIGHT FORWARDER INVESTIGATION**

The Commission having by its order of August 21, 1942, entered upon an investigation concerning the lawfulness under section 17 of the Shipping Act, 1916, as amended, of rules, regulations, practices and operations of forwarders named in the appendix to said order; and

It appearing, That Aetna Forwarding Co., All Transport & Storage Co., American Commercial Shipping Co., W. J. Brynes of New York, Inc., Caragol-Clarke Co., Inc., Columbo Company, Continam Shipping Co., Inc., Cosmos Shipping Co., Inc., W. H. Emig, Excel Shipping Co., Franklin Forwarding Co., P. J. Hanrohan, Inc., M. Garrison & Co., Inc., L. S. Hoetzoff & Co., Hoole Service Co., Imperial Forwarding Co., Intercontinental Forwarding, Inc., Knickerbocker Carriers, Inc., Ernest E. Marks Co., F. J. Markwalter, National Shipping & Forwarding Co., New York Forwarding Co., Porto Rican Express Co., Rex Forwarding Co., New York Forwarding Co., Porto Rican Express Co., Rex Forwarding Co., Ropke & Otto, Royal Shipping Co., John E. Safraan Co., Tee & Lynch, Inc., Universal Carloading Co., Wells, Fargo & Co., Young & Glehn, Inc., are, and each of them is, carrying on the business of forwarding in the Port of New York of foreign commerce, and is an "other person subject to this Act" within the meaning of that term as used in sections 1 and 17 of the Shipping Act, 1916, as amended:

It is ordered, That said Aetna Forwarding Co. and others named in the preceding paragraph be, and each of them is hereby named

respondent in this investigation, and that copy of the Commission's order of August 21, 1942, together with copy of this supplemental order, be served upon each of the said additional respondents; and

It appearing further, That, due to recent discontinuances in business, changes in names, and for other reasons, certain respondents named in the Commission's order of August 21, 1942, are no longer in fact responsive to respondents in this proceeding concerned;

It is further ordered, That John D. Allen, D. L. & W. R. R., Ernest E. Marks, Puerto Rico Shippers Service, and Wm. G. Young, be, and each of them is hereby, eliminated as respondents in this proceeding.

By the Commission.

[SEAL]

(Sgd.) W. C. PEET, Jr.,

*Secretary.*

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*Exhibit A-2 to petition*

**SECOND SUPPLEMENTAL ORDER**

At a Session of the United States Maritime Commission, held at the office in Washington, D. C., on the 1st day of December, A. D. 1942

No. 621

**PORT OF NEW YORK FREIGHT FORWARDER INVESTIGATION**

The Commission having by its order of August 21, 1942, entered upon an investigation concerning the lawfulness under section 17 of the Shipping Act, 1916, as amended, of rules, regulations, practices, and operations of forwarders named in the appendix to said order; and

It appearing, That Bruemmer & McGrath, John H. Faunce, New York, Inc., Foreign Shipping Service Co., Inc., Ira Furman Co., Hudson Shipping Co., Inc., Independent Forwarding & Car-leading Co., Inc., H. P. Lambert Co., Pan-Atlantic, Inc., Wells, Fargo & Co. of Cuba, William G. Young & Co., Inc. are, and each of them is, carrying on the business of forwarding in the Port of New York of foreign commerce, and is an "other person subject to this Act" within the meaning of that term as used in sections 1 and 17 of the Shipping Act, 1916, as amended:

It is ordered, That said Bruemmer & McGrath and others named in the preceding paragraph hereof be, and each of them is hereby, named respondent in this investigation, and that copy of the Commission's order of August 21, 1942, together with copy of supple-

mental order of September 22, 1942, and copy of this second supplemental order, be served upon each of said additional respondents; and

It appearing further, That, due to recent discontinuance in business, changes in names, and for other reasons, certain respondents named in the Commission's orders of August 21 and September 22, 1942, are no longer in fact responsive as respondents in this proceeding concerned;

It is further ordered, That William Bane & Co., Edy, P. 24 Broderick & Co., Bruemmer & Ackerman, Cemstock &

Theakston, Inc., J. G. Eberlein, John H. Faunce, Inc., Foreign Shipping Co., Inc., Freightling Corp. of America, Samuel Godwins & Sons, C. J. Holt & Co., Inc., Hudson Forwarding & Shipping Co., T. T. Hunter, Richard J. Hurley, Independent Forwarding Co., Jarrett & Willenbacher, Lambert & Barrows, Leonhardt & Bush, Lunham & Moore, International Corp., Ernest E. Marks Co., J. W. Masters & Co., National Shipping & Forwarding Co., Old Colony Forwarding Co., Redde Forwarding Co., Inc., Ropke & Otto, Shippers Storage Co., Inc., Titan Shipping Co., Inc., United States Freight Co., James E. Ward & Co., and Wells, Fargo & Co., be, and each of them is hereby eliminated as respondents in this proceeding.

By the Commission.

[SEAL]

(Sgd.) W. C. PEET, JR.,  
Secretary.

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*Exhibit A-3 to petition*

### THIRD SUPPLEMENTAL ORDER

At a Session of the United States Maritime Commission, held at its office in Washington, D. C., on the 8th day of December,

A. D. 1942

No. 621

### PORT OF NEW YORK FREIGHT FORWARDER INVESTIGATION

The Commission having by its order of August 21, 1942, entered upon an investigation concerning the lawfulness under section 17 of the Shipping Act, 1916, as amended, of rules, regulations, practices and operations of forwarders named in the appendix to said order; and

It appearing, that said persons, firms and corporations named in the appendix herein are, and each of them is, carrying on the business of forwarding in the Port of New York of foreign commerce, and is an "other person subject to this Act" within the

meaning of that term as used in sections 1 and 17 of the Shipping Act, 1916, as amended:

It is ordered, That said persons, firms, and corporations be, and each of them is hereby, named respondent in this investigation, and that copy of the Commission's order of August 21, 1942, together with copies of supplemental orders of September 22, 1942, and December 1, 1942, and copy of this third supplemental order, be served upon each of said respondents.

By the Commission.

[SEAL]

(Sgd.) W. C. PEET, JR.

*Secretary.*

Air Express International Agency.	Fox & Co., James.
Acme Fast Freight, Inc.	Frieme, A. L.
Airsea Shipping Co.	Galbally, J. J., Co.
Aeolian Shipping Co.	Garcia & Osorio.
Allied World Wide Forwarding Co.	General Export Service.
American European Shippers.	Gerlach, F. C., & Co.
Arguinbeau & Co., N. Y.	Gilbert, S.
Beck & Politzer.	Haig, Ch. H.
Bergey Shipping Service.	Hagemann, F. W.
Blundell Shipping Co.	Halperin Shipping Co.
Cary & Co.	Hamilton Forwarding Co.
Collins & Co. W. F.	Harveyson, J. A.
Cohen & Mann.	Hickey, John A.
Commercial Dispatch.	Hinricks & Peersal.
Continental Express Co.	Hopgood & Co.
Cunningham, J. A.	Hornboistal, C. S., Co.
Dailey, Stewart J.	Hull, John A., Co.
Devoy, H. B., & Co.	Hunter, R. J.
Dominquez Co.	Immediate Transportation Co.
Dow, Frank P.	Interspeed Agency.
Downing, T. D.	Irwin, James D., & Co.
Downing, T. F.	Israel, Charles.
Erskine Freight Forwarding Co.	Jenkkison, G. T.
Export Chemical Shipping Co.	Kamen, Howard.
Farrell, J. F.	Kaufman Co.
Fenton, A. W., Co.	Keiser, Russ E.
Fijux, G. F.	Kirk, Fred.
Foster, Wm. A., & Co., Inc.	Kronfeld & Saunders.
	Lang, Sidney.
	Lee, Charles.
	Manly, Winslow.

Mitchell, John.	State Forwarding & Shipping Co.
Mitchell Shipping & Forwarding Co.	Stauff, August F., & Co.
Mutual Forwarding Co.	Sternberg & Co.
Olympic Shipping Co.	Suarez Trading Co.
Petry, P. H.	Swiss American Shipping Agency.
Redicker Bros.	Traders Service Corporation.
Salter, A. W.	Tyson, Donald B.
Schmid, A. N.	Ueland Walter T.
Sellers, C. W., Transportation Co.	Uhlmann & Co.
Siess, George P.	Ward, J. L., & Co.
Smith, Charles T.	Weitzel & Reinhard.
Harry Solodow.	Wingate W. & Johnston.
Stahl, Frederick L.	Wood Niebuhr & Co.

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*Exhibit B to petition***ORDER**

At a Session of the United States Maritime Commission held at its office in Washington, D. C., on the 14th day of January, A. D. 1943

**IN THE MATTER OF CHARGES, RULES, REGULATIONS, PRACTICES AND OPERATIONS OF FREIGHT FORWARDERS AT THE PORT OF NEW YORK**

It appearing, That the individuals, firms and corporations named in the appendix hereto attached and made part hereof are "other persons" subject to the Shipping Act, 1916, as amended; and that full and complete information as to their charges, rules, regulations, practices and operations is necessary to the proper administration of the regulatory provisions of said Act;

It is ordered, Pursuant to the powers conferred upon the Commission by Section 21 of the Shipping Act, 1916, as amended, that the said persons named in the appendix hereto, be, and they are hereby notified and required to file with the Commission, at its office at 41 Broadway, New York, N. Y., a report of all information as set forth in the form hereto attached and marked Exhibit A, said report to be a true, accurate and complete record of all individual forwarding transactions taken from their books, records and documents billed during January and February, 1940; June and July, 1941; and November and December, 1942; and

It is further ordered, That the aforesaid report be in printed, typewritten or mimeographed form; that it be verified before a notary and signed by an officer of said persons, and that it be filed

as aforesaid within thirty days from the date of this order; and  
It is further ordered, That a copy of this order be served by  
registered mail upon each of said persons named in the appendix  
hereto attached at their respective addresses therein stated.

By the Commission.

[SEAL]

(Sgd.) W. C. PEET, Jr.,  
*Secretary.*

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#### APPENDIX

American Shipping Co., 10 Bridge St., New York, N. Y.  
American Union Transport, Inc., 33 Rector St., New York, N. Y.  
Andrews, D. C., & Co., Inc., 27 Water St., New York, N. Y.  
Atlantic Forwarding Co., Inc., 45 Pearl St., New York, N. Y.  
Atlas Forwarding Co., 2 Rector St., New York, N. Y.  
Baker, Irons & Dockstader, Inc., 8-10 Bridge St., New York, N. Y.  
Baltic Shipping Co., Inc., 10 Bridge St., New York, N. Y.  
Behring Shipping Co., 8-10 Bridge St., New York, N. Y.  
Bernard, J. E., & Co., Inc., 27 Pearl St., New York, N. Y.  
Bernstein, H. Z., Co., 38 Pearl St., New York, N. Y.  
Block, John, & Co., Inc., 16 Bridge Street, New York, N. Y.  
Bluefriis-New York, Inc., 44 Whitehall St., New York, N. Y.  
Bolton & Mitchell, Inc., 79 Wall St., New York, N. Y.  
Bryant & Heffernan, Inc., 80 Broad St., New York, N. Y.  
Caldwell & Company, Inc., 50 Broad St., New York, N. Y.  
Cavanagh Shipping Co., 10 Bridge St., New York, N. Y.  
Cofod, A. F., & Co., Inc., 24 State St., New York, N. Y.  
Colony Shipping Co., Inc., 75 West St., New York, N. Y.  
Cook, Thos., & Son—Wagons-Lits Inc., 221 Broadway, New York,  
N. Y.  
Corbett, M. J., & Co., Inc., 10 Bridge St., New York, N. Y.  
Davies, Turner & Co., 10 Bridge St., New York, N. Y.  
DeMay, A. J., & Co., Inc., 28 Water St., New York, N. Y.  
Downing, R. F., & Co., Inc., 16 Bridge St., New York, N. Y.  
Dumont Shipping Co., Inc., 11 Broadway, New York, N. Y.  
Dyson Shipping Co., Inc., 10 Pearl St., New York, N. Y.  
Errion Company, 17 State St., New York, N. Y.  
Farris, M., & Co., Inc., 10 Bridge St., New York, N. Y.  
Faunce, John H., New York, Inc., 17 State St., New York, N. Y.  
Foreign Shipping Service Co., Inc., 10 Bridge St., New York, N. Y.  
Freedman & Slater, Inc., 8 Bridge St., New York, N. Y.  
Gallagher & Ascher, Inc., 44 Whitehall St., New York, N. Y.  
Gallie Corporation, The, 50 Broad St., New York, N. Y.  
Gaynor, P. A., & Co., Inc., 44 Whitehall St., New York, N. Y.  
Gerhard & Hey Co., Inc., 44 Whitehall St., New York, N. Y.

Globe Shipping Co., Inc., 11 Broadway, New York, N. Y.  
Gogarty, H. A., Inc., 15 Moore St., New York, N. Y.  
Grodwohl, L., & Son, 72 Cortlandt St., New York, N. Y.  
Hampton, J. W., Jr., & Co., Inc., 17 Battery Place, New York, N. Y.  
Heimann, W., International Transportation Service, Inc., 24 State  
St., New York, N. Y.  
Hennigson, E., Co., Inc., 10 Bridge St., New York, N. Y.  
Hensel, Bruckmann & Lorbacher, Inc., 11 Broadway, New York,  
N. Y.  
Hirsbach & Smith, Inc., 44 Whitehall St., New York, N. Y.  
Hoole Service Co., Inc., 35 South William St., New York, N. Y.  
Hudson Shipping Co., Inc., 17 State St., New York, N. Y.  
Hunter, John H., & Son, Inc., 21 West St., New York, N. Y.  
Inge & Company, Inc., 29 Broadway, New York, N. Y.  
Intercontinental Forwarding, Inc., 34 Bridge St., New York, N. Y.  
Inter-Maritime Forwarding Co., Inc., 38 Pearl St., New York,  
N. Y.  
International Forwarding Co., Inc., 44 Whitehall St., New York,  
N. Y.  
Judson Sheldon Corporation, 19 Rector St., New York, N. Y.  
Karr, Ellis & Co., Inc., 10 Bridge St., New York, N. Y.  
Keer, Maurer Co., Brown Bldg., 4th and Chestnut Sts., Philadelphia, Pa.  
Kersten Shipping Agency, 24 State St., New York, N. Y.  
Lansen-Sueve Corporation, 15 Whitehall St., New York, N. Y.  
Lanham & Reeve, Inc., 10 Bridge St., New York, N. Y.  
Major Forwarding Co., Inc., 15 Moore St., New York, N. Y.  
Marks & Coyle, Inc., 17 State St., New York, N. Y.  
Maron & Schaefer, 11 Broadway, New York, N. Y.  
Marti, F., & Co., Inc., 44 Beaver St., New York, N. Y.  
29 Meadows, Wye & Co., Inc., 10 Bridge St., New York, N. Y.  
Mohegan International Corporation, 17 State St., New  
York, N. Y.  
Nelson, Fred O., Company, Inc., 79 Wall St., New York, N. Y.  
Neth, W. P., Co., Inc., The, 44 Whitehall St., New York, N. Y.  
New Netherland Co., Inc., 95 Broad St., New York, N. Y.  
Norton & Ellis of New York, Inc., 80 Broad St., New York, N. Y.  
Nydegger, A. E., & Co., Inc., 11 Broadway, New York, N. Y.  
Pitt & Scott Corporation, 25 Beaver St., New York, N. Y.  
Premier Shipping Co., Inc., 115 Broad St., New York, N. Y.  
Rogers, John C., & Co., Inc., Drexel Bldg., Philadelphia, Pa.  
Rohner, Gelrig & Co., Inc., 15 Moore St., New York, N. Y.  
Santos, E. L., & Co., Inc., 7 Water St., New York, N. Y.  
Saunders, R. J., & Co., Inc., 24 Stone St., New York, N. Y.  
Sellers Transportation Co., Inc., 22 Whitehall St., New York, N. Y.

Seven Seas Mercantile Transport Co., Inc., 15 Moore St., New York, N. Y.  
Smith, W. O., & Co., Inc., 32 Water St., New York, N. Y.  
Snedeker, Milton, Corp., 44 Whitehall St., New York, N. Y.  
St. John, H. W., & Co., 18 Pearl St., New York, N. Y.  
Tornabell, Ernest, 21 West St., New York, N. Y.  
United Shipping Corporation, 24 State St., New York, N. Y.  
Universal Transcontinental Corp., 40 Rector St., New York, N. Y.  
Van Oppen & Co., Inc., 18 Bridge St., New York, N. Y.  
Wallace, F. E., & Co., 44 Whitehall St., New York, N. Y.  
Wedemann & Godknecht, Inc., 100 Broad St., New York, N. Y.  
Wilson, A. S., Inc., 120 Greenwich St., New York, N. Y.  
Young, Daniel'F., Inc., 10 Bridge St., New York, N. Y.

*Exhibit G to Partition*  
**EXHIBIT A—UNITED STATES MARITIME COMMISSION**  
**Docket #621**

**INVESTIGATION FREIGHT FORWARDERS PORT OF NEW YORK**

Freight Forwarder:		Inland Freight		Cartage & Lighterage		Local Warehousing		Consular Blanks		Consular Fees		5		6	
Shipment:	S. S. Line:	A. Rail.	E. In transit.	A. Cartage	A. Storage					A. Fees					
A. Forwarder:	A. Name:	B. Overland,	F. Storage	B. Tools	B. Hand					B. Travels					
B. M. No.:	B. B.I.L. No.:	C. Water,	G. Handling	C. Lighterage											
C. Office No.:		D. Express,	H. Waiting.	D. Waiting.											
		Advanced	Billed	Advanced	Billed	Advanced	Billed	Advanced	Billed	Advanced	Billed	Advanced	Billed	Advanced	Billed
8		9		10		11		12		13		14		15	
& Telegraph		Postage & Stationery		Banking & Financing		Ocean Freight		Miscellaneous		Forwarding Fees and Service Charges		Commissions		Commission	
Ph.		A. Maritime War.		A. Banking Charge		A. Freight		A. Through B.L.		A. Preparation of B.L.		A. F. r. o. m. Ocean carriers.		A. F. r. o. m. Ocean carriers.	
Tel.		B. Coll. et Advancing.		B. Collection		B. Sampl.		B. Expenses		B. Preparation of other documents.		B. F. r. o. m. inland carriers.		B. F. r. o. m. inland carriers.	
Ab.		C. Advances		C. Advancing		C. Heavy lift.		C. Packing.		C. Trans. charges.		C. P. r. o. m. others.		C. Miscellaneous services.	
F.		Billed		Advanced		Billed		Advanced		Billed		Billed		Billed	
B.		Advanced		Billed		Advanced		Billed		Advanced		Billed		Billed	
I.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
G.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
H.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
J.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
K.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
L.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
M.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
N.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
O.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
P.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
Q.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
R.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
S.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
T.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
U.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
V.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
W.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
X.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
Y.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
Z.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
AA.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
BB.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
CC.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
DD.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
EE.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
FF.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
GG.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
HH.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
II.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
JJ.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
KK.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
LL.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
MM.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
NN.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
OO.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
PP.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
QQ.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
RR.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
SS.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
TT.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
UU.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
VV.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
WW.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
XX.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
YY.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
ZZ.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	
AA.		Billed		Advanced		Billed		Billed		Billed		Billed		Billed	
BB.		Advanced		Billed		Advanced		Billed		Billed		Billed		Billed	

## In United States District Court

[Title omitted.]

*Answer*

Filed June 17, 1943

The defendant herein, United States of America, by Howard F. Corcoran, United States Attorney for the Southern District of New York, answers the petition herein as follows:

First. Denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph of the petition marked "II"; and alleges that the plaintiffs are persons subject to the Shipping Act, 1916, as amended.

Second. Denies any knowledge or information sufficient to form a belief as to whether the plaintiffs enumerated in paragraph "I (a)" of the petition have their principal offices and places of business in the Southern District of New York, and admits the other allegations, contained in the paragraph of the petition marked "III."

Third. Admits the allegations contained in the paragraph of the petition marked "IV" and refers to Exhibits "A," "A-1," "A-2," and "A-3" annexed to the petition for the terms of the orders referred to in said paragraph; except that it alleges that the plaintiffs have been and now are subject to the Shipping Act, 1916, as amended, and within the jurisdiction of the United States Maritime Commission (hereinafter referred to as the "Commission").

32 Fourth. Admits the allegations contained in the paragraph of the petition marked "V," and refers to Exhibit "A" annexed to the petition for the terms of the order referred to in said paragraph.

Fifth. Denies each and every allegation contained in the paragraph of the petition marked "VI," except that it admits that the Commission circulated a questionnaire, annexed to the petition as Exhibit "C," and that the plaintiffs answered the interrogatory set forth in said paragraph in the affirmative.

Sixth. Admits the allegations contained in the paragraph of the petition marked "VII" and refers to the Rules of Procedure of the Commission for the provisions of Section 1.07 (d) referred to in said paragraph.

Seventh. Admits the allegations contained in the paragraph of the petition marked "VIII"; except that it alleges that whether the answers to the questionnaire referred to in said paragraph would be offered in evidence at any further hearing would depend

on the nature of the answers to said questionnaire; and further alleges that said evidence would be available to other persons only in accordance with the Rules of Procedure of the Commission.

Eighth. Admits the allegations contained in the paragraph of the petition marked "IX," and refers to Exhibit "B" annexed to the petition for the terms of the order referred to in said paragraph; and alleges that the time for the petitioners to furnish the answers to the questionnaire mentioned in said paragraph was first extended to April 15, 1943 and thereafter further extended to June 1, 1943. Copies of the orders of the Commission, dated February 26, 1943 and April 13, 1943 respectively, are annexed hereto as Exhibits "1" and "2."

33 Ninth. Denies each and every allegation contained in the paragraph of the petition marked "X," except that it refers to Exhibit "A" annexed to the petition for the provisions of the order referred to in said paragraph.

Tenth. Denies each and every allegation contained in the paragraphs of the petition marked "XI," "XII," "XIV," and "XV."

Eleventh. Admits the allegations contained in the paragraph of the petition marked "XIII-A" and refers to Exhibit "B" annexed to the petition for the terms of the order mentioned in said paragraph; except that it alleges that whether the information required by Exhibit "B" would be offered in evidence would depend upon the nature of the answers in response thereto, and that such answers would be made available to other persons only in accordance with the Rules of Procedure of the Commission.

Twelfth. Denies each and every allegation contained in the paragraph of the petition marked "XIII-B"; except that it admits that prior to the adoption of the form of the questionnaire annexed to Exhibit "B", the Commission failed to submit same to the Director of the Budget and obtain his statement that he did not disapprove it, and alleges that such submission was not required pursuant to the Federal Reports Act.

#### SECOND DEFENSE

Thirteenth. The petition fails to state a claim against the defendant upon which relief can be granted.

#### THIRD DEFENSE

Fourteenth. The plaintiffs have not been injured by any provisions of the order annexed to the petition as Exhibit "A," nor have they been required to perform or refrain from performing any act, and accordingly, this court has no jurisdiction.

isdiction to enjoin enforcement or execution of the terms of said order.

#### FOURTH DEFENSE

Fifteenth. On the 18th day of May 1943 the Commission vacated and set aside the order of January 14, 1943, and, pursuant to Section 21 of the Shipping Act, 1916, as amended, made its order requiring the respondents named in the appendix thereto to furnish certain information therein set forth. The Director of the Bureau of the Budget approved the form and contents of the questionnaire annexed to said order of May 18, 1943. Accordingly, the plaintiffs are not required to furnish any information pursuant to the order of January 14, 1943 (Exhibit B to the complaint) and may not seek to enjoin the enforcement thereof. The order of May 18, 1943 is annexed hereto as Exhibit "3" and the questionnaire referred to therein is annexed hereto as Exhibit "4."

Wherefore, the defendant prays that the petition herein be dismissed, together with the costs and disbursements of this action.

Dated New York, N. Y., June 15, 1943.

HOWARD F. CORCORAN,

*United States Attorney for the Southern District of New  
York, Attorney for Defendant.*

By: MARVIN M. NOTKINS,  
Marvin M. Notkins,

*Assistant United States Attorney, Office and P. O.  
Address: United States Court House, Foley Square,  
Borough of Manhattan, City of New York.*

#### ORDER

At a Session of the United States Maritime Commission held at its office in Washington, D. C., on the 26th day of February, A. D. 1943

#### IN THIS MATTER OF CHARGES, RULES, REGULATIONS, PRACTICES AND OPERATIONS OF FREIGHT FORWARDERS AT THE PORT OF NEW YORK

Upon consideration of requests made for extension of the time for compliance with the order entered herein, dated January 14, 1943, and certain respondents to said order having instituted a suit in the District Court of the United States, for the Southern

District of New York, to set aside and annul said order, and good cause appearing:

It is ordered, That said order of January 14, 1943, requiring compliance therewith within thirty (30) days from the date thereof, as modified by order dated February 4, 1943, so as to require such compliance on or before March 15, 1943, be and it is hereby further modified so as to require compliance therewith on or before April 15, 1943; and

It is further ordered, That the extension granted herein is without prejudice to the rights of the respondents named in said order of January 14, 1943, to apply for a further extension thereof.

By the Commission.

[SEAL]

(Sgd.) W. C. PEET, Jr.,  
Secretary.

36

*Exhibit 2 to answer*

#### ORDER

At a Session of the United States Maritime Commission held at its office in Washington, D. C., on the 13th day of April, A. D. 1943

#### IN THE MATTER OF CHARGES, RULES, REGULATIONS, PRACTICES and OPERATIONS OF FREIGHT FORWARDERS AT THE PORT OF NEW YORK

It is ordered, That the order of January 14, 1943, as modified, be, and it is hereby, further modified so as to require compliance therewith on or before June 1, 1943.

By the Commission.

[SEAL]

(Sgd.) W. C. PEET, Jr.,  
Secretary.

37

*Exhibit 3 to answer*

#### ORDER

At a Session of the United States Maritime Commission, held at its office in Washington, D. C., on the 18th day of May, A. D. 1943

No. 621

#### PORT OF NEW YORK FREIGHT FORWARDER INVESTIGATION

It appearing, That full and complete information as to the charges, rules, regulations, practices, and operations of respondents named in the appendix which is attached hereunto and made

part hereof is required for use in connection with the proceeding herein and is necessary to the proper administration of the regulatory provisions of the Shipping Act, 1916, as amended;

It further appearing, That the Commission, by its order dated January 14, 1943, as amended, ordered the said respondents, except Gondrand Shipping Co., Inc., Massee-Barnett Co., Inc., Phoenix Shipping Co., Inc., and Victory Shipping Co., Inc., to furnish certain information as set forth in Exhibit A to said order; and

It further appearing, That the Director of the Bureau of the Budget has approved revised Appendix A, which is attached hereto and made a part hereof;

It is ordered, That the said order of January 14, 1943, be, and it is hereby, vacated and set aside;

It is further ordered, Pursuant to the powers conferred upon the Commission by Section 21 of the Shipping Act, 1916, as amended, that said respondents named in the appendix hereto, be, and they are hereby, notified and required to file with the Commission; at its office at 45 Broadway, New York, N. Y., a report of all information as set forth in Exhibit A, attached hereto, said report to be a true, accurate and complete record of 105 individual forwarding transactions taken from their books, records, and documents as follows: 35 of which were billed consecutively commencing January 1, 1940; 35 billed consecutively commencing June 1, 1941, and 35 billed consecutively commencing November 1, 1942;

It is further ordered, That the aforesaid report be in printed, typewritten or mimeographed form; that it be verified before a notary and signed by respondent or an officer of said respondent if a corporation, and that it be filed as aforesaid within 45 days from the date of this order; and

It is further ordered, That a copy of this order be served by registered mail upon each of said respondents named in the appendix hereto attached at their respective addresses therein stated.  
By the Commission.

[SEAL]

(Sgd.) W. C. PEET, Jr.,  
*Secretary*

#### *Exhibit 4 to answer*

*Exhibit A—UNITED STATES MARITIME COMMISSION*

Docket #621

**REPORT OF NEW YORK FREIGHT FORWARDER INVESTIGATION**

Budget Bureau No. 62-43004. Approval Expires Dec. 31, 1941.

30 UNITED STATES VS. AMERICAN UNION TRANSPORT, INC., ET AL.

40 In United States District Court

[Title omitted.]

*Notice of motion for summary judgment*

Filed March 8, 1944

SIR: Please take notice that on the pleadings herein, the annexed affidavit of Maurice A. Krisel, sworn to the 2nd day of July 1943, and the exhibits annexed thereto, together with the record of certain testimony had before G. O. Basham, Examiner designated by the United States Maritime Commission, at hearings held on December 9th and 10th, 1942 in a proceeding designated "Port of New York Freight Forwarder Investigation, Docket No. 621," and the exhibits received in evidence at said hearings, the undersigned will move the Honorable Thomas W. Swan, Honorable Alfred C. Coxe and the Honorable Francis G. Caffey, constituting a special court appointed pursuant to a certain order dated February 12, 1943, on the 15th day of July 1943, in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, at 2:30 in the afternoon of said day, or at such time and place as the aforesaid Court may designate, for an order directing that summary judgment be entered in favor of the defendant on the ground that the petition fails to state facts sufficient to constitute a cause of

action and that the pleadings on file, the affidavit and exhibits hereto annexed and the record of testimony and exhibits hereinabove referred to, show that there is no genuine issue as to a material fact and that the defendant is entitled to judgment as a matter of law, and for such other and further relief as to the Court may seem just and proper.

Dated New York, N. Y., July 2, 1943.

Yours, etc.

HOWARD F. CORCORAN,

*United States Attorney for the Southern District of New York, Attorney for Defendant, Office & P. O. Address, United States Court House, Foley Square, Borough of Manhattan, New York, New York.*

To:

HAROLD L. ALLEN, Esq.

*Attorney for Petitioners,*

*30 Rockefeller Plaza, New York, N. Y.*

*In United States District Court*

[Title omitted.]

*Affidavit of Maurice A. Krisel***STATE OF NEW YORK.***County of New York, Southern District of New York, ss:*

Maurice A. Krisel, being duly sworn, deposes and says:

I am a Senior Attorney employed by the War Shipping Administration and I am in charge of the investigation sought to be enjoined by the plaintiffs in the above proceeding, having been assigned thereto by the General Counsel of the United States Maritime Commission (hereinafter called the Commission), under arrangements for the interchange of personnel between the two agencies. I am thoroughly familiar with all the facts and circumstances with regard thereto. This affidavit is submitted in support of a motion for summary judgment made on behalf of the defendant, and in opposition to the plaintiffs' motion for a temporary injunction.

On August 21, 1942, the Commission, pursuant to the Shipping Act, 1916, as amended (46 U. S. C. §§ 801-842), instituted a general investigation, on its own motion, concerning the lawfulness of the rules, regulations, practices, and operations of certain freight forwarders named in its order, as supplemented, copies

of which are annexed to the petition as Exhibits "A,"  
43 "A-1," "A-2" and "A-3." The purpose of the investigation was to make such order or orders or to take such other action as may be warranted by the record. This investigatory order was made on the basis of information indicating that a corporation known as Foreign Freight Contractors, Inc., a company doing the same type of business as the plaintiffs, was engaged in practices which appeared to be in violation of the Shipping Act, 1916, as amended, and detrimental to the commerce of the United States, leading the Commission to the conclusion that it was in the public interest to conduct a general inquiry to determine the extent of such unlawful practices among all other freight forwarders in the Port of New York subject to the Act. In addition to the foregoing, other information was at hand and numerous complaints had been received regarding practices prevalent in the industry.

After the issuance of the initial order, the Commission sent to all the respondents named therein, a questionnaire, a copy of which is annexed to the petition as Exhibit "C." The information sought to be obtained concerned the various practices

of the respondents and among the questions propounded was the following:

"2. Do you carry on the business of forwarding in connection with common carriers by water in foreign commerce?"

All the plaintiffs answered the question in the affirmative.

After the receipt of the questionnaire, a brief ex parte investigation was made by the Commission, and subsequently public hearings were held in Brooklyn, New York on December 9th and 10th, 1942. There will be handed to the Court on the argument of the motion, a copy of the minutes taken at the hearings and the exhibits received in evidence therein. As a result  
44 of the information adduced at the hearings and in order to obtain time to continue compiling the data necessary for the successful continuation thereof, the investigation was adjourned sine die.

Thereafter deponent on behalf of the Commission entered upon a study of the freight forwarding industry in connection with off-shore steamer service out of the Port of New York and determined as a result thereof that in view of the number of parties to the investigation, and the innumerable phases and ramifications of the industry, the task would be interminable without the cooperation of the freight forwarders themselves. Accordingly, a schedule setting forth the required data was prepared by deponent, and after consultation with the Director of the Division of Regulation and the General Counsel of the Commission, was delivered to the counsel for the plaintiffs, who thereafter advised deponent that the plaintiffs would furnish none of the information requested. Thereupon, on January 14, 1943, the Commission issued its order (Exhibit "B" to the petition) annexing a schedule and requiring the plaintiffs to file the answers thereto by February 14, 1943. The time to furnish the answers was extended to April 15, 1943, and then to June 1, 1943. On May 18, 1943, the Commission vacated and set aside its order on January 14, 1943, and issued a new order (Exhibit "3" to the answer) requiring substantially the same information but limiting the answers to 105 individual forwarding transactions. The new questionnaire (Exhibit "4" to the answer) bears the approval of the Director of the Bureau of the Budget.

Further to substantiate the contention of the Government that the plaintiffs carry on the business of forwarding in connection with a common carrier by water as defined in the Act, there  
45 are annexed hereto (Exhibit I) letterheads used by four of the plaintiffs. These examples indicate that the plaintiffs hold themselves out to the public as freight forwarders and are typical of the type of representations made by all those engaged

in the industry. It will be noted that Globe Shipping Co., Inc. is described as "Freight Forwarders and Brokers"; A. E. Nydegger & Company utilizes the description "International Freight Forwarders"; R. J. Saunders & Co., Inc. refers to its business as that of "Export Freight Contractors"; and Judson-Sheldon Corporation mentions "Foreign Freight Forwarders." There is also annexed an invoice from D. C. Andrews & Co., Inc. (Exhibit II), likewise described as "Foreign Freight Forwarders," in connection with a shipment from New York to Brazil per the S. S. Etna, setting forth the various items for which charges are made. The shipping instructions appearing on the reverse of the invoice are also annexed (Exhibit III). Paragraph 12 of those instructions is as follows:

"The Company, in fixing charges for freight and other services, shall have the right to charge rates in excess of those charged by any and all carriers and other agencies selected by the Company to transport and deal with the goods, and the difference between the rates and charges made by such carriers and agencies and those made by the Company shall be considered as part of the Company's profit or compensation for its services. The Company's compensation shall also include all brokerage, commissions, profits and sums received by the Company from Carriers, Insurers and others in connection with the shipment. The Company shall have the option in assessing or fixing charges for freight, insurance and other items in which it may include its profits, of basing such charges on the weights, measurements, values and other information furnished by the Sender."

An examination of the invoice shows that it is impossible for the shipper to determine which portion of each charge represents moneys actually advanced by the forwarder and what portion represents profits by the forwarder on each item.

There is also annexed (Exhibit IV) a similar invoice by Davies, Turner & Co., referred to as "Freight Forwarders to all Parts of the World," representing a shipment from New York to Ecuador per S. S. Huemul. Each of the plaintiffs conducts business with foreign countries and the industry utilizes practically every steamship line operating out of the Port of New York.

On the pleadings, exhibits and this affidavit, defendant respectfully submits that the plaintiffs are within the purview of the Act and accordingly are subject to investigation by the Commission, and that the petition should be dismissed and judgment directed in favor of the defendant.

MAURICE A. KRISEL. (Sgd.)  
Maurice A. Krisel.

Sworn to before me this 2nd day of July 1943.

EDWARD M. FOX, Notary Public.

Cable: Judshel. New York, Chicago

Representatives Thruout the World

**JUDSON SHELDON CORPORATION**

**FOREIGN FREIGHT FORWARDERS, FREIGHT BROKERS & CONTRACTORS—  
CUSTOMS BROKERS**

Judson Freight Forwarding Co. Established 1873. G. W. Sheldon & Company. Established 1870.

Executive and General Offices, 19 Rector St., New York, N. Y., U. S. A.

Boston, Baltimore, Philadelphia, St. Louis, Mobile, Chicago, Los Angeles, New Orleans, Seattle, Houston, San Francisco.

APRIL 15, 1943.

Telephone: Bowling Green [9-9066  
[9-9067

Cable Address "Anydegger"

**A. E. NYDEGGER & COMPANY**

**INCORPORATED**

Customs Clearance Arranged.

Codes: Bentley's A. B. C. 6th Edition.

Swiss American Shipping Agency

International Freight Forwarders—Export and Import Freight Contractors

11 BROADWAY

NEW YORK, N. Y.

Established 1903

Cable Address: Kronsaud.

Telephone Whitehall 4-0595.

UNITED STATES VS. AMERICAN UNION TRANSPORT, INC., ET AL.

35

R. J. SAUNDERS & CO., INC.

EXPORT FREIGHT CONTRACTORS

Customs Brokers

24 Stone Street, New York

Telephones  
Digby 4-  
7292  
7293  
7294  
7295  
7296  
7297

11 Broadway

No.

NEW YORK, 8/14/41.

Mr. Herman Cohen & Co., 374 Broadway, N. Y. C.

TO GLOBE SHIPPING CO., INC., DR.

FREIGHT BROKERS AND FORWARDERS

Custom House Brokers

Regular Services To and From All Parts of the World

Waybill No. 9991. Shipped per S-S *Carrillo* on 8/15/41 from  
N. Y.; Consigned to order of Antonio Chaljub, Cartagena,  
Colombia.

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Exhibit II

Established 1884

Freight Brokers, Contractors.

Custom House Brokers—Foreign Freight Forwarders

D. C. ANDREWS & CO., INC.

27-29 Water Street

NEW YORK

12/2/42.

In account with Bernau & Co., Inc., 320 Fifth Avenue, New  
York City.

D. C. A. Ref. 50475. Shippers Ref. 1501. Shipping Instructions Dated \_\_\_\_\_

Shipment of 1 Ctn. Per S. S. *Etna*. Sailed about \_\_\_\_\_. Consigned to or by Magazin Segadaes, Rio de Janeiro, Brazil.

	<i>Description of Charges</i>	<i>Amount</i>
Ocean Freight	Cubic Feet @ Per Spec Min.	\$3.00
Ocean Freight	Cubic Feet @ Per	
Ocean Freight	Lbs. @ Per	
Ocean Freight	Lbs. @ Per	
Foreign Port and Government Charges, Prop.		
Consular Fees	Blank Consular Forms	3.85
Preparation and handling Consular Invoice, Notary, Translation, etc.		.75
Certification of Commercial Invoices		.50
Messenger Service to Steamship Co., Merchants Ass'n., Consular Office, etc.		
Inland Railroad Freight and Charges		
Insurance—Marine \$75.00 @ 17% Marine & War		12.75
Insurance		
Arranging Insurance under Consignee's or Shipper's policy, Messenger service, etc.		
Transfer in New York		
Transfer in New York		
Preparation and handling Bill of Lading		2.50
War-Time Formalities		
Custom's Clearance, Verification Export License, etc.		1.00
Cables	Telegrams	
Postage and Petties		
Preparing and handling draft, Completing Manufacturer's Invoices, Collection Letter credit		
Storage, Labor In and Out of Warehouses		
Air Mail		1.60
Advancing Ocean Freight and Charges		
Booking Steer Space		.50
Total Charges		26.45

#### TERMS CASE

The above items represent principally cash paid out for your account, and include our profit and compensation for our services rendered. Prompt remittance in New York funds is respectfully requested.

All shipments handled and charges billed subject to terms and conditions appearing on our Acknowledgment of Shipping Instructions for which has already been sent to you.

*Exhibit IV***EXPORT DEPARTMENT**

Cable Address, "Spedition," New York, Boston, Phila., Chicago.

NEW YORK, May 29, 1942.

Whitehouse &amp; Pine, Inc., 80 Broad St., New York City.

Our Ref. 28798

**To DAVIES, TURNER & Co.**

Established 1870

**Freight Forwarders to Custom Brokers Trucking Contractors  
All Parts of the World**

8-10 Bridge Street, New York

Phone Bowling Green 9-7960

Philadelphia, 801 Brown Bldg. Boston, 89 Broad Street. Chicago, 111 W. Monroe Street. New Orleans, 302 Perdido Bldg.

Consignee, Francisco P. Illingsworth, Guayaquil, Ecuador.

Charges on 7 crates Bathtubs & Fittings, 3 cartons Bathtubs & Fittings, 8621 lbs. Per S. S. Huemul.

Marks & Nos. F P I GUAYAQUIL, 1/7, 8/10.

All shipments are handled on the terms and conditions printed on our instruction blanks which blanks our customers are asked in every case to fill out, sign and send to us. These forms and conditions are also printed on the acknowledgement sheet sent acknowledging receipt of instructions on this shipment.

Freight and Charges 316/-	@ 30¢, less 5%, plus 54%, sur. 15.80	\$154.49
Cartage to Warehouse		
Cartage to Steamer		
Merchants Ass'n Fee		.50
Consular Fees		37.30
Consular Forms		.30
Consular Service		2.50
Banking Service		
Warehouse charges and labor		
Packing and Cases		
Preparing bills of lading		2.50
Shipping Commission		
Insurance and Placing		
Customs Clearance and Permit		1.00
Payable abroad charge		

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C. O. D. for account of shippers	
Special Service and Expenses	
Postage, Letters and Petties	
Telegrams and Cables	
British Navicert Fee and Services	
Services, U. S. Export License	
Services, War time Formalities	1.00
	199.59

The above statement represents the disbursements paid by us for your account for items of freight and otherwise, including therewith in each case our profit or compensation, for our service.

51 In United States District Court

[Title Omitted.]

*Notice of motion for restraining order*

Filed April 6, 1944

SIR: Please take notice that upon the annexed affidavit of Herbert A. Byrne, duly sworn to the 14th day of July, 1943, the pleadings, and all the papers and proceedings heretofore had herein, the undersigned will move the Hon. Thomas W. Swan, the Hon. Alfred C. Coxe, and the Hon. Francis G. Caffey, constituting a special Court, appointed pursuant to an order dated February 12, 1943, at a term thereof to be held in the United States Court House, in the Borough of Manhattan, City of New York, on the 16th day of July, 1943; at two-thirty o'clock in the afternoon, of the said day, or at such other time and place as the aforesaid court may designate, for an order pursuant to the provisions of Section 47, Title 28, U. S. Code, enjoining and restraining, during the pendency of the above entitled action, the United States Maritime Commission and the defendant herein, their agents, servants, and attorneys from in any manner pursuing the investigation initiated by the said the Maritime Commission of the United States, by its order dated August 21, 1942, entitled Docket No. 621, and staying and suspending, during the pendency of this action and until the entry of the further order or judgment of this court finally determining the same, the orders of the United States Maritime Commission dated respectively August 21, 1942

and May 18, 1943, and for such other, further, and different relief as to the Court may seem just.

Dated New York, July 14, 1943.

Yours, etc.,

HAROLD L. ALLEN,

Attorney for Plaintiffs,

52 Office and Post Office Address: No. 30 Rockefeller  
Plaza, Borough of Manhattan, City of New York.

To:

HOWARD F. CORCORAN, Esq.,

United States Attorney for the Southern District of New  
York,

Attorney for Defendant,

United States Court House, New York City, N. Y.

53 In United States District Court

[Title omitted.]

*Affidavit of Herbert A. Byrne*

STATE OF NEW YORK,

County of New York, ss:

Herbert A. Byrne, being first duly sworn, deposes and says: I am the President of the New York Foreign Freight Forwarders and Brokers Association, Inc. All of the plaintiffs in the above entitled action are members of the said Association. I am also Vice President of W. O. Smith and Co., Inc., one of the plaintiffs herein. I am familiar with the business loosely described as "foreign freight forwarding" as the same is conducted at the Port of New York, where all of the plaintiffs herein are engaged in business.

Some of the plaintiffs herein conduct their business under the titles of "freight forwarders"; some under the title or designation of "freight brokers"; and some as "shippers' agents." All perform substantially the same character of service, which is the following:

A manufacturer, merchant, exporter, or other American businessman; whose place of business is situate inland, desires to make a shipment of merchandise to some port without the continental limits of the United States. If this shipment passes through the Port of New York, he may engage one of the plaintiffs herein, or a firm or individual in a similar line of business. The merchandise is consigned to the Port of New York, to a so-called "forwarder" or "shipping agent," who then makes all of the arrangements for the dispatch of this merchandise to the foreign port.

54 In order to do this, the shipper's agent must possess certain highly specialized knowledge. He must, for example, be familiar with the laws of the country of destination, in order to prepare the consular invoices, the fraudulent or erroneous preparation of which may subject the goods upon arrival at destination to seizure or high penalty. He must obtain expeditiously permits from the Board of Economic Warfare, the American Association of Railroads, the Chamber of Commerce or board of trade certifying the domestic origin of the said goods, and must be familiar with the practices of these agencies as well as the consulates.

In addition, he must possess knowledge of the lines of steamships serving various foreign ports, the customs at the port of destination, and, to a certain extent, the rates of inland carriers at the country of destination, if the merchandise is intended for delivery at some place which is not itself a port of call.

Upon the arrival of this merchandise at the Port of New York, the shipper's agent or so-called "forwarder" arranges for the cartage of the merchandise from the rail terminal to the steamship terminal. If a substantial period of time intervenes between the receipt at the Port of New York and delivery to an outgoing steamer, he arranges for the warehousing of such goods. He then seeks to obtain space at the cheapest legal rate and lowest legal classification, and having secured such space, procures the bill of lading to be issued in the name of the shipper and owner, and procures the appropriate transportation at destination either directly or through some correspondent known to him at that port. Before the merchandise can be dispatched, all of the legal preliminaries of the consulates of the countries, and the various government agencies must be attended to. He also, when requested to do so, secures the necessary insurance, whatever that may be—either fire, marine, war risk, or whatever coverage the particular circumstance of the case requires.

55 In performing these services, the so-called "forwarder" acts solely as the agent of the shipper. He does not enter into any contracts in the ordinary course of business on his own behalf, nor does he take the bill of lading in his own name; his services and functions are of a quasi professional character, but in all instances his relationship to the shipper is that of agent and principal, and once the merchandise is dispatched from the Port of New York, his responsibility to the shipper in connection with it is ended.

I have said that he ordinarily does not take the bill of lading in his own name, although there may be times when two shipments of similar character, bound for the same port and the same consignee, although of different origin, may be economically com-

solidated, in which instance the bill of lading is taken, not in the name of the several owners, but in the name of the agent. There are occasions, although they arise infrequently, when consignments from different shippers may be consolidated and arrangements made through some correspondent or warehouseman at the port of destination to break the bulk of said shipments at destination and separately forward them inland in the foreign country.

The so-called "forwarder" assumes no responsibility for the transportation of the shipment from origin to destination. This responsibility is assumed by the several common carriers, under the terms of their bills of lading, and the only contact, association, or relationship of any character subsisting between the agent and the carrier is that which arises under the terms of the bill of lading, and is the same relationship which subsists between any person entering into a contract of affreightment with a common carrier.

I am advised and verily believe that there is no statutory definition in any state or in the United States defining a "foreign freight forwarder." I am advised and verily believe that there is none in the Shipping Act. The only statutory definition of a freight forwarder is one contained in the Domestic Freight Forwarders Act—an amendment to the Interstate Commerce Act, passed by Congress in May 1942. This Act (Public Law 558, 77th Congress, Part IV of the Interstate Commerce Act, 49 U. S. Code 102) provides in part as follows:

\* \* \* \* (5) The term 'freight forwarder' means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act.

\* \* \* \* (8) \* \* \* (c) The provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for

the purpose of securing the benefits of carload, truckload, or other volume rates, or (2) to the operations of a warehouseman or *other shippers' agent*, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed."

If this definition be applied by analogy to the business of a so-called "foreign freight forwarder" and the term "foreign commerce" be substituted for "interstate commerce" where the same appears in the Act, the plaintiffs in this action would not fall within such definition, since they do not, in the ordinary and usual course of their business or undertakings either assemble and consolidate or break the bulk and distribute such consolidated shipments, nor do they assume responsibility for the property from the point of receipt to the destination. Once the merchandise is loaded upon the steamship and dispatched, their relation to it and their responsibility for it, if any, ceases.

This applies also to the occasional consolidated shipments. Their responsibility to the shipper, in connection with such an operation, terminates once the merchandise is aboard the steamship, and accordingly is confined solely to the terminal area at the Port of New York where the operation is performed.

On the 21st day of August 1942, the Maritime Commission of the United States, purporting to act under the authority of Sections 1 and 17 of the Shipping Act of 1916, issued an order,

copy of which is annexed to the petition herein, instituting the investigation of so-called "forwarders" at the Port of New York, including these plaintiffs. This order, to the terms of which reference is respectfully made, did not charge nor did it allege that any of the plaintiffs herein had committed any breach of existing law, nor does it allege or state that any complaints of breaches of existing law by any of these plaintiffs had been made to it. The allegation is that a certain corporation, which I believe to be defunct and out of business, known as Foreign Freight Contractors, Inc. had issued a contract "under the guise of bills of lading" and "although not a carrier, purports to establish freight rates and engages in other acts and practices with respect to contracts it makes with shippers which appear to be in violation of Section 17 of the Shipping Act of 1916 as amended." There was indeed no evidence of any character before the Maritime Commission to indicate that any of these plaintiffs had committed any breach of law or violated the provisions of any statute. This is admitted by the Commission itself. On October 15, 1942, R. H. Hallett, Director of the Division of Regulation of the Maritime Commission, directed a communication to the Imperial For-

warding Company, 89 Broad Street, New York, New York; a copy of which is hereto annexed, marked "A" and made a part hereof. This communication reads in part:

"The legal basis for the institution of this proceeding is found in the Shipping Act, 1916, as amended. Section 1 thereof makes those 'carrying on the business of forwarding in connection with a common carrier by water' subject to the Act. Section 17 requires that such persons 'shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property.' Further, it empowers the Commission, upon finding that such regulations or practices are unjust or unreasonable, to determine, prescribe, and order enforced just and reasonable regulations and practices. Section 16 requires that regulations and practices be free from undue preference and prejudice. Section 22 authorizes the Commission to investigate, *upon its own motion, any violation of the Act.*

Inasmuch as this is the first general proceeding involving the foreign freight forwarding industry, the Commission decided not only to investigate certain *apparently unlawful practices* which had come to its attention, *but to make a general inquiry into the practices of all forwarders* at the port of New York—not with the conviction that the business generally is carried on in an unlawful manner—but for the purpose of developing facts upon basis of which the Commission can formulate a sound regulatory policy with reference to this industry, and to avoid a multiplicity of hearings." [Italics supplied.]

After the issuance of this order, these plaintiffs, by their attorney, appeared at the initial hearing held by the Commission and challenged its jurisdiction as to them. Thereafter, and on the 14th day of January 1943, a certain additional order, copy of which is annexed to the petition as Exhibit "B" thereto, and to the terms of which reference is respectfully made, was served upon these plaintiffs. Annexed thereto was a questionnaire of an exceedingly complex nature, which would have required, upon reasonable estimate, more than a million answers in order to comply with it. Within thirty days from the receipt thereof, these petitioners were required to answer those questions under oath, under pain of being fined \$100 a day for every day of default, pursuant to the provisions of Section 820, Title 46, U. S. Code. No prior approval of the Director of the Budget, as required by the Federal Reports Act of 1942, was endorsed upon this questionnaire.

After its receipt, the plaintiffs herein instituted the present action on or about February 12, 1943. Issue was not joined by

the service of the defendant's answer until on or about June 15, 1943. In the meantime, the Commission had, from time to time, issued certain supplementary orders extending the time within which these plaintiffs were required to answer the questionnaire annexed to this order of January 14th, the final extension expiring on June 1, 1943. On May 18, 1943, the Commission, apparently with the knowledge that its order of January 14th was entirely illegal, on its own motion, issued an order which, among other things, provided:

"It is ordered, that the said order of January 14, 1943 be and it is hereby vacated and set aside."

The said order, copy of which is hereto annexed, marked "B" and made a part hereof (also annexed to defendant's answer as Exhibit 3 thereto), to the terms of which reference is respectfully made, had annexed to it an additional questionnaire which had received the approval of the Director of the Budget, pursuant to the Federal Reports Act of 1942, and which required these plaintiffs to furnish information similar to that required by the order of January 14th, but in a modified form. The modification consisted of a reduction in the number of transactions to be reported, but was otherwise identical with the requirements of the order of January 14, 1943. By the terms of the said order, the answers to the questionnaire were required to be filed with the Commission within forty-five days from May 8, 1943, or on July 2, 1943, under pain of being fined \$100 per day for every day of default, pursuant to the provisions of Section 820, Title 46, U. S. Code.

There are sixty-six plaintiffs herein, and upon information and belief, the aggregate of such fines would be \$6,600.00 per day.

The Maritime Commission has not, up to this time, notwithstanding the pendency of this action, extended the time within which plaintiffs might respond to the said questionnaire, although request has duly been made to them that the time be extended pending the hearing and determination of this motion and the entry of the order of the court thereon.

I am advised and verily believe that the plaintiffs herein may suffer irreparable damage unless a preliminary injunction is issued staying and enjoining the operation of the said order of May 18, 1943, during the pendency of this action, as well as enjoining the investigation directed to be made under the order of August 21, 1942, for the reasons herein set forth.

The order of May 18, 1943, is supplementary to the order of August 21, 1942, being entitled in and bearing Docket No. 621. By the terms of the prior order the Commission seeks to inquire into the rates, fares, and charges of these plaintiffs "and the

method of assessing and collecting" their charges. By the terms of the questionnaire annexed to the order of May 18, 1943, they are required to furnish the Maritime Commission with the names and addresses of each customer in thirty-five billed consecutive transactions each in the months of January 1940, June 1941, and November 1942, together with the following information:

The nature of the shipment, its makers, steamship line upon which it was forwarded, and the bill of lading number, and to break down into two separate bookkeeping items, the amount of inland freight advanced by the plaintiffs and billed to the customer in fourteen different items, the amount of cartage and lightering in eight different items, the amount of storage and handling charges in four different items, warehousing in two items, consular blanks in two items, consular fees in two items, messenger fees in four items, telephone and telegraph charges in six items, postage and notary charges in two items, insurance charges in four items, so-called "banking and finance" charges in six items, ocean freight charges in ten items, miscellaneous charges in eight items, so-called "forwarding fees and service charges" in six items, and so-called "commission charges" in six items, with respect to each of the 105 transactions with respect to which the questionnaire is to be answered.

This order is arbitrary and capricious. In order to answer the questionnaire, each of the plaintiffs will be required to employ an accountant to analyze their books, records, and papers, to pick out thirty-five consecutive transactions so far back as January 1, 1940, analyze the said transactions and report the same to the Maritime Commission at their great expense and to their customers' great prejudice and damage. The customers will be damaged since the said questionnaires will be offered in evidence at the inquiry and confidential trade secrets as to the persons with whom the said customers deal abroad, the nature of the merchandise, and the time and manner of forwarding the same will be disclosed and the relationship subsisting between these plaintiffs and their customers will be prejudiced and destroyed because the said information has become public by virtue of an investigation directed against these plaintiffs.

Moreover, I am informed and believe that under the provisions of Section 17 of the Shipping Act of 1916 (Title 46, Section 816, U. S. Code) the Congress of the United States expressly withheld from the Maritime Commission jurisdiction over the rates, fares, and charges of "other persons" subject to the Shipping Act, and the said Maritime Commission has no authority to inquire into such charges, even if these plaintiffs were subject to the jurisdiction of the Commission.

The granting of such information under pain of being fined \$100 a day while the jurisdiction of the Maritime Commission is in question will greatly prejudice these plaintiffs and subject them to irreparable business loss and damage in their relationship with their customers.

Moreover, the order of May 18, 1943 (the only questionnaire now outstanding) is so ineptly drawn with respect to a number of the questions, that plaintiffs cannot determine what answers they must give to comply with it.

61 For example, question 6 is headed "Messenger" and is subdivided—(a) fees, (b) travels. It is impossible to determine what is meant by the terminology employed, or to determine what "travels" is. Webster defines the word as a "moving or progress of any kind" and if, from that description, plaintiffs are to conclude that the question requires a description of the movement of every office boy and messenger for thirty-five consecutive transactions in each of the months indicated, so far back as 1940, together with a statement of his carfares and fees, it is simply impossible to respond to it. Records are nonexistent. Moreover, fees and traveling expenses of messenger boys, as the court knows, are customarily bulked in petty cash and cannot at this time be allocated to any transaction. The same observation applies to practically every other question propounded in the said questionnaire. For example, question 7 requires a breakdown with respect to each transaction of long distance telephone charges, telegraph charges, and cable charges. Telephone bills three years old have been destroyed by a number of the plaintiffs. In instances where the bills are in existence, it is impossible to allocate the charges shown on the books to any specific transaction, particularly where there are many transactions for the same customer.

The same observation applies to paragraph 8, where the plaintiffs are required to break down their postage and notary charges. It is impossible to break down petty cash postage charges and to require it is arbitrary and capricious in the highest degree.

Moreover, many of the plaintiffs do not number their invoices, nor keep them in such form that they are able to ascertain what transactions are consecutive. For example, see the bill of Davies Turner and Company, annexed to the defendant's motion dated July 2, 1943, herein and the bill of D. C. Andrews and Company dated 12/2/42, which gives a reference number but does not indicate whether reference numbers are assigned in consecutive order.

The arbitrary and capricious nature of all of the questions, defendant respectfully avers are indicated upon the face of the questionnaire, but attention is invited to item 10, described as "banking and financing." The plaintiffs herein are shippers

62 agents and are not engaged in the banking business. The term "banking charge" is unknown to the industry or trade, as is the term "collect charge." Your deponent and other plaintiffs with whom he has consulted simply do not know what these terms mean, nor do they know what the term "advancing" means, and can only surmise that it is intended to mean all sums of money advanced for the account of a customer, in which instance it would be included in all other charges billed, since the agent customarily advances all charges for the account of his customer. It must be assumed that question 10 was included solely for the purpose of annoying and harassing the plaintiffs and burdening them with the expense of making complicated accounting analyses not customarily made in their business.

Another example may be given in item 14—"commissions from inland carriers." The court well knows that no commissions may be paid by inland carriers, whose rates are fixed by law through the Interstate Commerce Act.

An additional reason why a preliminary injunction should issue herein arises out of the conduct of the agents of the Maritime Commission during the pendency of this action. Not content with attempting to conduct an investigation under the authority asserted by them under the Shipping Act of 1916, one Maurice Krisel, an attorney employed by the Maritime Commission has gone about stirring up difficulties between these plaintiffs and their customers, between the Insurance Department of the State of New York and their customers, and making reckless and unsubstantiated charges against so-called "freight forwarders" generally.

During the spring of 1943, the said Krisel approached the Superintendent of Insurance of the State of New York, and recklessly charged that foreign freight forwarders at the Port of New York made advances for insurance premiums for their customers' accounts and that many of them "pad" the premiums ten or twenty percent. Although no complaints had been made to the Superintendent of Insurance, and although the Maritime Commission has no jurisdiction over the subject matter of insurance, an investigation was ordered by the Superintendent of Insurance, and these plaintiffs and other forwarders are being harassed and annoyed thereby.

63 Your deponent has been repeatedly informed by the members of the New York Foreign Freight Forwarders and Brokers Association, Inc., that investigators, acting under the said Maurice Krisel, have approached customers of some of the plaintiffs herein, recklessly informed the said customers that they were being overcharged by some of these plaintiffs, and sought

to stir up commercial difficulties and discord between these plaintiffs and the persons with whom they do business. Upon the trial of this action, witnesses will be subpoenaed to testify to such activities, but attempts heretofore made to obtain affidavits have resulted in members of the Association declining to make such affidavits on the ground that they would be singled out and harassed not only by the Maritime Commission and the Insurance Department of the State of New York, but by other agencies of the Government, acting at the instigation of the said Krisel.

For all of the foregoing reasons, your deponent, on behalf of himself and the other plaintiffs in this action, respectfully prays that an order be made herein enjoining and restraining the defendant, its agents, servants, and attorneys, during the pendency of this action, from pursuing the investigation initiated by it, entitled Docket No. 621, staying and suspending the orders of the United States Maritime Commission, dated respectively August 21, 1942, and May 18, 1943, and that the plaintiffs have such other, further, and different relief as to the Court may seem just.

Sworn to before me this 14th day of July 1943.

HERBERT A. BYRNE.

64

*Exhibit A*

OCT. 5, 1942.

Docket No. 621.

IMPERIAL FORWARDING CO.

89 Broad Street, New York, New York.

Attention Mr. R. P. Rockmore.

GENTLEMEN: Receipt is acknowledged of your letter dated September 29, 1943, protesting against the inclusion of your name as a respondent in the above numbered docket.

The legal basis for the institution of this proceeding is found in the Shipping Act, 1916, as amended. Section 1 thereof makes those "carrying on the business of forwarding in connection with a common carrier by water" subject to the Act. Section 17 requires that such persons "shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property." Further, it empowers the Commission, upon finding that such regulations or practices are unjust or unreasonable to determine, prescribe, and order enforced just and reasonable regulations and practices. Section 16 requires that such regulations and practices be free from undue preference and prejudice. Section 22 authorizes the Commission to investigate, upon its own motion, any violation of the Act.

RECEIVED  
U.S. MARITIME COMMISSION  
OCT 5 1942

Inasmuch as this is the first general proceeding involving the foreign freight forwarding industry, the Commission decided not only to investigate certain apparently unlawful practices which had come to its attention, but to make a general inquiry into the practices of all forwarders at the port of New York—not with the conviction that the business generally is carried on in an unlawful manner—but for the purpose of developing facts upon basis of which the Commission can formulate a sound regulatory policy with reference to this industry, and to avoid a multiplicity of hearings.

It is to be regretted that you feel that there is a stigma attached to being named as a respondent. In general inquiries of this nature it has always been the practice to name, for instance, all common carriers engaged in a particular trade or all terminal operators in a particular port area. This policy is followed by other regulatory agencies, and, to our knowledge, has never been subjected to criticism.

You mention the burden involved in making an appearance before the Commission. While the Commission does not attempt to advise parties as to what representation they should have at hearings, your attention is called to section 2.01 of the Commission's Rules of Procedure, which provides that any individual may appear in his own behalf at hearings held under such rules.

For your information, there are enclosed excerpts from the Shipping Act, 1916, containing the sections referred to above, together with a copy of the Commission's Rules of Procedure.

Very truly yours,

(Signed) R. H. Hallett,  
R. H. HALLETT,

*Director Division of Regulation.*

Enclosures.

(Signed) G. O. Basham: mt.  
G. O. BASHAM.

66

### Exhibit B

#### ORDER

At a Session of the United States Maritime Commission, held at its office in Washington, D. C., on the 18th day of May, A. D., 1943.

No. 621

#### PORT OF NEW YORK FREIGHT FORWARDERS INVESTIGATION

It appearing, That full and complete information as to the charges, rules, regulations, practices and operations of respond-

ents named in the appendix which is attached hereto and made part hereof is required for use in connection with the proceeding herein and is necessary to the proper administration of the regulatory provisions of the Shipping Act, 1916, as amended;

It further appearing, That the Commission, by its order dated January 14, 1943, as amended, ordered the said respondents except Gondrand Shipping Co., Inc., Massco-Barnett Co., Inc., Phoenix Shipping Co., Inc., and Victory Shipping Co., Inc., to furnish certain information as set forth in Exhibit A to said order; and

It further appearing, That the Director of the Bureau of the Budget has approved revised Appendix A, which is attached hereto and made a part hereof;

It is ordered, That the said order of January 14, 1943, be, and it is hereby vacated and set aside;

It is further ordered, Pursuant to the powers conferred upon the Commission by Section 21 of the Shipping Act, 1916, as amended, that the said respondents named in the appendix hereto, be, and they are hereby, notified and required to file with the Commission, at its office at 45 Broadway, New York, N. Y., a report of all information as set forth in Exhibit A, attached hereto, said report to be a true, accurate and complete record of 105 individual forwarding transactions taken from their books,

67 records, and documents as follows: 35 of which were billed consecutively commencing January 1, 1940; 35 billed consecutively commencing June 1, 1941; and 35 billed consecutively commencing November 1, 1942;

It is further ordered, That the aforesaid report be in printed, typewritten or mimeographed form; that it be verified before a notary and signed by respondent or an officer of said respondent if a corporation, and that it be filed as aforesaid within 45 days from the date of this order; and

It is further ordered, That a copy of this order be served by registered mail upon each of said respondents named in the appendix hereto attached at their respective addresses therein stated.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr., Secretary.

American Shipping Co., 10 Bridge St., New York, N. Y.  
American Union Transport, Inc., 33 Rector St., New York, N. Y.  
Andrews, D. C., & Co., Inc., 27 Water St., New York, N. Y.  
Atlantic Forwarding Co., Inc., 46 Pearl St., New York, N. Y.  
Atlas Forwarding Co., 2 Rector St., New York, N. Y.

Baker, Irons & Dockstader, Inc., 8-10 Bridge St., New York, N. Y.

Baltic Shipping Co., Inc., 10 Bridge St., New York, N. Y.

Behring Shipping Co., 8-10 Bridge St., New York, N. Y.

Bernard, J. E., & Co., Inc., 27 Pearl St., New York, N. Y.

Bernstein, H. Z., Co., 38 Pearl St., New York, N. Y.

Block, John & Co., Inc., 16 Bridge St., New York, N. Y.

Bluefries, New York, Inc., 44 Whitehall St., New York, N. Y.

Bolton and Mitchell, Inc., 79 Wall St., New York, N. Y.

Bryant & Hefferman, Inc., 80 Broad St., New York, N. Y.

Caldwell & Company, Inc., 50 Broad St., New York, N. Y.

Cavanaugh Shipping Co., 10 Bridge St., New York, N. Y.

Cofod, A. F., & Co., Inc., 24 State St., New York, N. Y.

Colony Shipping Co., Inc., 75 West St., New York, N. Y.

Cook, Thos., J. Son-Wagons-Lits Inc., 221 Broadway, New York, N. Y.

Corbett, M. J., & Co., Inc., 10 Bridge St., New York, N. Y.

Davies, Turner & Co., Inc., 10 Bridge St., New York, N. Y.

DeMay, A. J., & Co., Inc., 28 Water St., New York, N. Y.

Downing, R. F., & Co., Inc., 16 Bridge St., New York, N. Y.

Dumont Shipping Co., Inc., 11 Broadway, New York, N. Y.

Dyson Shipping Co., Inc., 10 Pearl St., New York, N. Y.

Erion Company, 17 State St., New York, N. Y.

Farris, M., & Co., Inc., 10 Bridge St., New York, N. Y.

Faunce, John H., New York, Inc., 17 State St., New York, N. Y.

Foreign Shipping Service Co., Inc., 10 Bridge St., New York, N. Y.

Freedman & Slater, Inc., 8 Bridge St., New York, N. Y.

Gallagher & Ascher, Inc., 44 Whitehall St., New York, N. Y.

Gallie Corporation, The, 50 Broad St., New York, N. Y.

Gaynor, P. A., & Co., Inc., 44 Whitehall St., New York, N. Y.

Gerhard & Hey Co., Inc., 44 Whitehall St., New York, N. Y.

Globe Shipping Co., Inc., 11 Broadway, New York, N. Y.

Gogarty, R. A., Inc., 15 Moore St., New York, N. Y.

Gondrand Shipping Co., Inc., 24 State St., New York, N. Y.

Grodwohl, L., & Son., 72 Cortlandt St., New York, N. Y.

Hampton, J. W., Jr., & Co., Inc., 17 Battery Place, New York, N. Y.

Heimann, W., International Transportation Service, Inc., 24 State St., New York, N. Y.

Hennigson, M., Co., Inc., 10 Bridge St., New York, N. Y.

Hensel, Bruckmann & Lorbach, Inc., 11 Broadway, New York, N. Y.

Hirschbach & Smith, Inc., 44 Whitehall St., New York, N. Y.

Hoole Service Co., Inc., 35 South William St., New York, N. Y.

- Hudson Shipping Co., Inc., 17 State St., New York, N. Y.  
Hunter, John H., & Son, Inc., 21 West St., New York, N. Y.  
Inge & Company, Inc., 29 Broadway, New York, N. Y.  
Intercontinental Forwarding, Inc., 34 Bridge St., New York, N. Y.  
Inter-Maritime Forwarding Co., Inc., 44 Whitehall St., New York, N. Y.  
International Forwarding Co., Inc., 44 Whitehall St., New York, N. Y.  
Judson Sheldon Corporation, 19 Rector St., New York, N. Y.  
Karr, Ellis & Co., Inc., 10 Bridge St., New York, N. Y.  
Keer, Maurer Co., Brown Bldg., 4th and Chestnut Sts., Philadelphia, Pa.  
Kersten Shipping Agency, 24 State St., New York, N. Y.  
Lansen-Naeve Corporation, 15 Whitehall St., New York, N. Y.  
Lunham & Reeve, Inc., 10 Bridge St., New York, N. Y.  
Major Forwarding Co., Inc., 15 Moore St., New York, N. Y.  
Marks & Coyle, Inc., 17 State St., New York, N. Y.  
Maron & Schaefer, 11 Broadway, New York, N. Y.  
Marti, F., & Co., Inc., 44 Beaver St., New York, N. Y.  
Massee-Barnett Co., Inc., 723-th Ave., New York, N. Y.  
Meadows, Wye & Co., Inc., 10 Bridge St., New York, N. Y.  
Mohegan International Corporation, 17 State St., New York, N. Y.  
Nelson, Fred O., Company, Inc., 79 Wall Street, New York, N. Y.  
Neth, W. P., Co., Inc., The, 44 Whitehall St., New York, N. Y.  
New Netherland Co., Inc., 95 Broad St., New York, N. Y.  
Norton & Ellis of New York, Inc., 80 Broad St., New York, N. Y.  
Nydegger, A. E., & Co., Inc., 11 Broadway, New York, N. Y.  
Phoenix Shipping Co., Inc., 21 State St., New York, N. Y.  
Pitt & Scott Corporation, 25 Beaver St., New York, N. Y.  
Premier Shipping Co., Inc., 115 Broad St., New York, N. Y.  
Rogers, John C. & Co., Inc., Drexel Bldg., Philadelphia, Pa.  
Rohner, Gehrig & Co., Inc., 15 Moore St., New York, N. Y.  
Santos, E. L., & Co., Inc., 7 Water St., New York, N. Y.  
Saunders, R. J., & Co., Inc., 24 Stone St., New York, N. Y.  
Sellers Transportation Co., Inc., 22 Whitehall St., New York, N. Y.  
Seven Seas Mercantile Transport, Co., Inc., 15 Moore St., New York, N. Y.  
Smith, W. O. & Co., Inc., 32 Water St., New York, N. Y.  
Snedeker, Milton Corp., 44 Whitehall St., New York, N. Y.  
St. John, H. W. & Co., 18 Pearl St., New York, N. Y.  
Tornabell, Ernest, 21 West St., New York, N. Y.

United Shipping Corporation, 24 State St., New York, N. Y.  
Universal Transcontinental Corporation, 40 Rector St., New York, N. Y.

Van Oppen & Co., Inc., 18 Bridge St., New York, N. Y.  
Victory Shipping Co., Inc., 10 Bridge St., New York, N. Y.  
Wallace, F. E. & Co., 44 Whitehall St., New York, N. Y.  
Wedemann & Godknecht, Inc., 100 Broad St., New York, N. Y.  
Wilson, A. S., Inc., 120 Greenwich St., New York, N. Y.  
Young, Daniel F., Inc., 10 Bridge St., New York, N. Y.

70 Before United States Maritime Commission  
\* \* \* \* \*

Whereupon HAROLD C. Dow was called as a witness in behalf of the Commission, and having been duly sworn, testified as follows:

Mr. KRISSEL. I offer in evidence Volume 1 of Docket No. 621 of the United States Maritime Commission, labeled A to C, being the initials in alphabetical order of the respondents who have filed these questionnaires.

The EXAMINER. Any objection to this offer? As there is no objection, I will receive it as Exhibit No. 2.

(The document referred to was received in evidence and marked "Commission's Exhibit 2.")

Mr. KRISSEL. I offer in evidence similarly Volume 2, D to G, Vol. 3, H to L, Volume 4, M to R, Volume 5, S to Y.

The EXAMINER. Without objection, those will be received, as Exhibit No. 2.

71 (The documents referred to were received in evidence and also marked "Commission's Exhibit 2.")

Mr. KRISSEL. If it becomes necessary to refer to any specific application, we will mark it with a letter.

Mr. THORNTON. These are questionnaires that were sent to the forwarders by the Maritime Commission.

The EXAMINER. That is right.

Mr. THORNTON. And that applies to the extent that they were received or concluded?

The EXAMINER. Yes. And they are all under oath, too.

Direct examination by Mr. KRISSEL:

Q. What is your full name?

A. Harold C. Dow.

Q. Where do you live?

A. Garden City, Long Island.

Q. What is your business?

A. Assistant manager of forwarding for the War Shipping Administration.

72 Q. Will you give us a brief history of your connections in those twenty years?

A. Well, I have been in the export shipping business.

Q. What companies have you been associated with?

A. Dyson Shipping Company.

Q. Any other companies?

A. Transshipping and Distributing Warehouse Corporation.

Q. Are there any more?

A. That about covers it.

Q. Are you familiar with the ramifications of the freight forwarding; foreign freight forwarding business?

A. Yes, sir.

Q. Would you be good enough to detail for us, if you will, briefly, the general nature of the freight forwarding business, foreign freight forwarding business?

A. Well, the foreign freight forwarding business has been in existence for approximately 100 years, and is an export shipping medium that is used by almost all export shippers. And the forwarders maintain offices at all ports, and their duties are arranging the necessary space with the steamship companies, and obtaining permit for the acceptances of the freight at piers, and

from time to time it is necessary for the forwarder to  
73 arrange suitable storage space for the shipment until the  
steamers are available, or for other causes. Also the for-  
warder is obligated to check the marks on shipping papers and  
containers to be certain that they are in accordance with the regu-  
lations prescribed by the country to which the shipment is  
destined.

Also, if the containers are damaged, the forwarder sees that they are recovered. If the material in the containers is found to be damaged en route to seaboard, the forwarder notifies the insurance company so that an inspection may be made to ascertain the extent of the damage. A forwarder must attend to the procurement when requested of all useful Government documents, such as export licenses, preference rating certificates, BEW space applications, ODT permits, AAR permits, and comply with such other regulations as may from time to time be announced. These practices, of course, are necessary, due to wartime procedures at the present time.

A forwarder traces and follows up shipments and instructs common carriers, truckmen, or suppliers to effect delivery to piers, warehouses, terminals, or other places as required. Perhaps and clear through the Customs House, export declarations, and prepare ocean bills of lading, drafts, consular papers, and other documents necessary to comply with the regulations of the country of destination.

74 Convert weights and measurements into metric system when necessary. Arrange for insurance protection on the freight. Forward all necessary documents to consignee and/or banks or other parties, as instructed by exporter. Check supplier's individual weights and measurements against steamship lines' assessments and reconcile them when necessary; advance all necessary freight charges and/or other expenses incurred on the shipment in behalf of the exporter.

The forwarder must keep a complete record of all shipments dispatched for the convenience of the exporter and prosecute such claims as may be required by the exporter against carriers, insurance companies and/or other parties at interest.

The forwarder in normal times has up to the minute sailing schedules and keeps in constant touch with the steamship company to ascertain if any substitutes are made in the steamer name or changes in scheduled ports of call. These are most of the duties accomplished by the freight forwarder.

Q. Would you say, then, in short, that the freight forwarder is a sort of representative of the exporter or shipper?

75 A. Yes, sir.

Q. And performs generally the functions that the shipper would ordinarily have to perform in order to see that the goods arrive at destination?

A. Yes, sir.

By the EXAMINER:

Q. Just what duties does the forwarder have in connection with receiving of shipments?

A. Just how do you mean that? Do you mean when they arrive at the seaboard?

Q. When they arrive at the seaboard; yes?

A. They usually get the arrival notice and order the freight to the pier from that document.

Q. The freight is consigned to the forwarder at the port?

A. Well, it could be consigned to the manufacturer in care of the forwarder.

Q. Or it could be consigned to the forwarder?

A. That is right.

Q. Then the forwarder there takes custody of the property, does he?

A. That is right.

76 Q. Does he do any handling of the property after it reaches the port?

A. Does he do any physical handling? No.

Q. Does he arrange for the handling?

A. He arranges for the handling for the account of the exporter.

Q. Such as drayage, and so forth?

A. That is right.

Q. How about any storage that may be involved? Does he make any arrangements for storage?

A. He usually takes care of that when it is necessary.

Q. And what does he do in connection with the delivering of the property?

A. To ultimate destination, do you mean?

Q. Yes.

A. Well, he arranges the space for the carrying vessel and orders it to that vessel, as I have said before, and arranges the documents that are necessary in connection with the shipment.

Q. He has custody of the property until it is delivered to the vessel?

A. That is correct.

77 Q. When it arrives at destination, we will say, at a foreign port, what are his duties there in connection with the delivery of the property?

A. Well, it all depends on where the shipment is going. Of course, the forwarder might have agents abroad to handle the shipments from one port to another.

Q. Now, do his agents abroad take possession of the shipment after it is delivered by the steamship company at port of destination?

A. Yes; they could do that.

Q. They see that it is delivered there?

A. That is right.

By Mr. THORNTON:

Q. Mr. Dow, the explanation you made of the activities of the forwarder, was that confined to the Port of New York, or was that a general description applying to all ports?

A. That was a general description.

Q. There is no particular difference between what a forwarder would do at one port than at New York?

A. It is practically the same duties at all ports.

By the EXAMINER:

78 Q. Your experience is limited to the Port of New York?

A. That is right.

By Mr. ROSE:

Q. When you say that a foreign freight contractor or forwarder attends to the issuing of documents, he may have arranged with

a shipper to charge, say three or four dollars for making out his consular documents, he may have done that; is that right?

A. I don't know.

Q. If the consul refuses to give the consular documents out because of some irregularity on the description or 50 other reasons, do you say, sir, that the freight forwarder is responsible for that? That is, now, mind you, if the freight forwarder has arranged to attend to the issuing of the consular documents. Now gentlemen, I am referring to an account I have had for 25 years. Now, I have, for 25 years, given that arrangement, to charge so much, but if the counsel or the British Government or whatever it may be don't give those documents—

Mr. KRISEL. I think Mr. Rose will have an opportunity under oath to make such a statement on the witness stand. It is wholly irregular at this time.

79 By Mr. KRISEL:

Q. Mr. Dow, most of the freight forwarders are located generally on the seaboard cities of the United States; is that right?

A. All those in the export business; yes, sir.

Q. Where would you say the principal freight forwarders conduct their business on the seaboards of the United States? Would you say, New York, Boston, Philadelphia?

A. I would say all ports.

Q. All ports?

A. Yes, sir.

Q. That would extend around the coasts of the United States?

A. The West Coast, the Gulf, the Atlantic.

Q. Do you know if there is any difference in the practices of freight forwarders in all ports?

A. About the same in all ports.

Q. With variations depending on localities?

A. That is right.

Q. These freight forwarders serve exporters and shippers throughout the country, inland, coastwise, and otherwise?

80 A. Yes, sir.

By Mr. BOOKSTAYER:

Q. Mr. Dow, is it customary for the forwarder to consign goods to his own care at the port of destination, to himself?

A. That would be an unusual case, I believe, if it were done. Of course, there is nothing to prevent it, I guess.

Q. Generally speaking, is the shipment consigned to the—

A. The ultimate consignee, as a rule; yes, sir.

Cross-examination by Mr. ATHA:

Q. Mr. Dow, have you had any experience outside of the Port of New York with the freight-forwarding business?

A. No, sir.

Q. And what concerns did you say you were associated with?

A. Dysoh Shipping Company and Transshipping, Distributing and Warehousing Corporation.

Q. During that period of time, exactly what was your connection with those companies?

A. I was in an administrative capacity.

Q. What was your title?

81 A. I was president of Dyson Shipping Company and also president of the Transshipping, Distributing and Warehousing Corporation.

Q. In connection with those duties, would you say at the time you were connected with those concerns, that the conditions were the same or different than they are today?

A. Well, they are considerably different today than they have been previous to the war.

Q. To what do you describe that difference?

A. Well, the war.

Q. So that you would say that today you don't have a normal condition?

Mr. KRISSEL. I object to the conclusion, Mr. Examiner, of "normal." Let us have the facts as to what the differences are, then we will determine whether they are normal or not.

Mr. ATHA. I will consent to that.

By Mr. ATHA:

Q. Will you please explain, in your own words, Mr. Dow, each of the differences between the freight-forwarding business in times of peace and the freight-forwarding business as it is today?

82 A. Well, there are many more documents to be obtained today than there were previous to the war.

Q. Please name the documents that are necessary to be obtained that were not necessary prior to the war time?

A. I have already named some of them in my testimony.

Q. I know, but I am asking you now, if you please, sir.

A. Well, it is required to get an AAR permit, ODT permit—

Q. Will you explain what an AAR permit is?

A. I am not familiar with that.

Q. Well, now, Mr. Dow, you are testifying in the nature of an expert here, are you not—

The EXAMINER. Isn't that obvious that that is American Association of Railroads' permit? Isn't that it?

Mr. ATHA. Yes. I am trying to bring out what these documents

are. The witness says he is not familiar with the document.

The EXAMINER. Go ahead,

By Mr. ATHA:

Q. Do you know the purpose of that AAR document?

A. No, sir.

83 Q. Do you know where it is obtained?

A. At the American Association of Railroads.

Q. Do you know what must be done in order to obtain it?

A. No, sir.

Q. Do you know what information must be given in order to procure one of those permits?

A. No, sir.

Q. Now, what other documents were you mentioning?

A. The ODT permit.

Q. What is an ODT permit?

A. I could not say.

Q. Well, have you ever obtained one yourself?

A. No, sir.

Q. Have you ever obtained an ODT permit?

A. No, sir.

Q. Now, what other papers are necessary in wartime that are not necessary in times of peace?

A. Will you repeat that question, please?

(The question was read.)

The WITNESS. Well, I have been with the War Shipping Administration since March of this year, and I am not familiar with the documents that are required during this time, that is, the 84 additional documents that are necessary during this period, during the war period.

Q. Now, Mr. Dow, you knew you were coming here this morning to testify in this proceeding, did you not?

Mr. KRISER. I object to that, Mr. Examiner, it is wholly necessary.

The EXAMINER. Sustained. Do you really want that information in the record? Because if you do, put it in yourself.

Mr. ATHA. I would like very much to have as much of this information before all of us, so that we can see whether or not the testimony has been given by a man who is familiar with the situation as it exists today, or whether this man's period of connection with the freight-forwarding business terminated prior to the present-day situation, which we contend is abnormal.

Mr. KRISER. I think witnesses will be called to testify to the abnormal conditions which require preparation of additional documents.

The EXAMINER. Do you have any further questions?

Mr. ATHA. Yes; I do have.

85

By Mr. ATHA:

Q. Now, Mr. Dow, in addition to the preparation of additional documents, what other procedures today differ from those in ordinary peacetimes in the freight-forwarding business?

A. Well, they are numerous.

Q. Will you please name another? You have named the preparation of additional documents.

A. Well, steamship space is more difficult to obtain at the present time on commercial business.

Q. What is the principal difference in connection with that difference of obtaining space that you can state?

A. Will you repeat the question, please?

(Question read.)

Mr. KRISSEL. Mr. Examiner, I think I must register my objection here. The Commission is prepared to concede that during wartimes there are abnormal conditions which require extensive service on the part of freight forwarders, which they would not ordinarily have in peacetimes. I renew my objection to the question and this line of testimony.

86 Mr. ATHA. May I answer that?

The EXAMINER. No; don't answer it at all. How many more questions do you have along this line?

Mr. ATHA. It depends on Mr. Dow. He is listing for me the number of differences that there are now in the freight-forwarding business which do not obtain in normal times. I am trying to bring out, as your Honor can see, the situation with which we have to contend now.

The EXAMINER. Don't you think it would be better to do that through a witness who is more familiar with those particular procedures than Mr. Dow admits that he is?

Mr. ATHA. I think that Mr. Dow's testimony is valuable from this standpoint: He had a number of years' experience in the freight-forwarding business under normal conditions. He would therefore be in a position to say how the present-day practice differs from the practice as he knew it when he was in the freight-forwarding business.

The EXAMINER. Proceed with your questions, but I don't want to spend too much time on this one issue.

87 Mr. KRISSEL. Are you overruling my objection?

The EXAMINER. For the present.

Mr. KRISSEL. I am taking an exception.

By Mr. ATHA:

\*Q. Mr. Dow, you were mentioning the limitation of steamship space. Will you state the practice that must be considered in connection with the obtaining of steamship space in wartime?

A. Well, the biggest factor is that there are not enough steamers.

Q. Now, is there any factor to be considered in connection with the regularity or irregularity of sailing of those steamers?

A. Yes, sir.

Q. What is that problem?

A. Well, the vessels are taken over by the Government frequently, and its schedules are not maintained.

Q. Do you know of a situation where goods are shipped, and then found that they have to be reshipped because of a change in schedules?

A. That is right.

Q. Would you say that that was another factor at this time?

A. Yes, sir.

88 Q. That doesn't obtain in normal times?

A. That is right.

Q. Any others that you know of in connection with the shortage of shipping space?

A. That is all I can think of.

Q. Now, in addition to the additional documents required and the difficulties in connection with obtaining shipping space, what other factors would you say should be considered in connection with the freight forwarding in wartime?

A. I don't know of any other factors on commercial business.

Q. Well, now, you have testified pursuant to the Examiner's questions, that the freight forwarding includes not only receiving these goods, but the handling and the storage and the delivery of the goods. Is that correct?

A. Yes, sir.

Q. Now, the problems that you have mentioned have had to do with what phase of the freight forwarders business?

A. I would say the main phase of the freight forwarders business.

89 Q. How about delivery. Do you consider that there is any difference between ability to deliver those goods in wartime and peacetime?

A. Of course.

Q. Aside from the shipping, do you see any other factor?

A. Well, of course, during this wartime period everything is harder to do; it is harder to obtain deliveries; both truck and rail deliveries take longer as a rule.

Q. Would you say that any phase of the freight forwarders business today is the same as the freight forwarders business before the war?

A. I would say it is much more difficult today.

Q. Which part of the freight forwarders business is identically the same now as it was before the war?

A. Well, most of the documents, of course, are all the same.

Q. For instance, what documents?

A. The export declarations; dock receipts.

Q. So you say the export declarations today are the same as they were before the war?

A. Approximately, the same, except that you have to have the export declarations before you can make delivery 90 to the piers.

Q. Otherwise, there is no change?

A. None that I know of.

Q. Well, are there any that you don't know of?

The EXAMINER. Never mind. Don't answer that.

By MR. ATHA:

Q. Mr. Dow, I ask you whether there were any phases of this work, freight forwarding, whether it involves the receiving or the handling or the storage or the delivery, which are the same today as they were before the war?

A. Well, naturally everything is more difficult to do today than it was before the war.

Q. And you would say that everything in connection with this freight forwarding business is in a different condition than it was before the war, would you?

A. Yes, sir.

MR. KRISSEL. Wait a minute. I object to the form of the question.

MR. ATHA. The witness has answered the question.

The EXAMINER. Are you through?

MR. ATHA. Yes, sir.

91 Redirect examination by MR. KRISSEL:

Q. You have been in the freight-forwarding business for upward of 20 years?

A. That is right.

Q. The general nature of the business was fundamentally the same then as it is today, with the exception of the general increase in difficulties in the performance of the work; is that right?

A. Yes, sir.

Q. Now, you left your business, didn't you?

A. Yes, sir.

Q. When did you leave it?

A. March of this year.

Q. Where did you go to work?

A. WSA.

Q. What is your function in the WSA?

A. Assistant manager of forwarding.

Q. Have you been able to come into contact with the difficulties that are being experienced by private freight forwarders?

A. Not since I left my business.

92 Mrs. ROGERS. May I ask my manager to answer the questions of Mr. Atha?

Mr. GONZALES. I think I will be able to answer the questions of the lawyer.

The EXAMINER. You will have an opportunity later on.

Mr. MCGRATH. Will you tell me how many employes that organization has?

Mr. KRISEL. I object to that. That is confidential information.

The EXAMINER. What is the purpose of the question?

Mr. MCGRATH. I would like to bring out what that organization is doing on the level with our own organizations.

The EXAMINER. I don't think it has any bearing on this proceeding at all.

Mr. MCGRATH. It is information. I cannot see where there is anything hard about it.

The EXAMINER. He isn't put on here as a representative of the WSA at all.

Mr. MCGRATH. I would like to know what that organization is; what it is made up of.

The EXAMINER. He is testifying for the Maritime Commission.

93 Mr. MCGRATH. He is testifying for the War Shipping Administration.

The EXAMINER. Your question is overruled. Anything else you want to know?

Mr. MCGRATH. Yes. I would like to know how many departments there are in the War Shipping Administration.

The EXAMINER. I will not allow any questions along that line. That has no bearing whatsoever on this question.

By Mr. MCGRATH:

Q. Are you a government employe?

A. Yes, sir.

Q. Well, being a government employe, would he know what the departments are made up in other organizations of the Government?

The EXAMINER. If you want to know anything about the War Shipping Administration, I suggest you get in touch with them.

Mr. McGrath. What I want to know is what work they do up there.

Mr. KRISEL. The War Shipping Administration is not a respondent in this proceeding, and Mr. Dow was not called 94 to testify in behalf of the War Shipping Administration or any other governmental agency, except as an expert witness for the Maritime Commission. We object to any questions propounded to him in connection with the War Shipping Administration or any of the departments.

Mr. McGrath. He has testified as an expert. I would like to know how expert he is. How many organizations he has and what they had up there.

The EXAMINER. No questions will be permitted along that line.

Mr. DORF. You have just said he was an expert. If he has been qualified as an expert, I move he be vacated as an expert, because he has satisfied myself and a percentage of the men here who have had experience that he has not given the facts in connection with the wartime conditions.

The EXAMINER. That is a matter of argument, not testimony.

Mr. DORF. May I ask him some questions?

By Mr. DORF:

Q. Mr. Dow, do you know what the BEW is?

A. I have testified to that.

Mr. KRISEL. He has testified to that?

95 By Mr. DORF:

Q. Do you know what the BEW is?

A. No, sir.

Q. Did you ever hear of the Board of Economic Warfare?

A. Yes, sir.

Q. Do you know the applications made for an export license?

A. No.

Q. Ever heard of them?

A. I have heard of them.

Q. Do you know what the form looks like?

A. No, sir.

Q. Have you ever heard of the form?

A. I have heard of them.

Q. Do you know what the form looks like?

A. No, sir.

Q. Have you ever heard of the form of the BEW for the allocation of space?

A. Yes, sir.

Q. Have you ever seen that form?

A. No.

96 Q. Do you know, as a matter of fact, that you have to the steamship company a letter of what you have in offering?

A. No, sir.

Q. Do you handle any commercial cargo?

A. I don't; no, sir.

Q. In your capacity as assistant manager, do you know whether they handle any commercial cargo?

A. Well, I am only with the Lend-Lease business.

Q. Then you don't handle any commercial cargo?

The EXAMINER. Wait a minute. The question is not clear. Do you mean, does he handle it for the War Shipping Administration?

Mr. DORF. For the War Shipping Administration, but in his capacity as assistant manager for the War Shipping Administration.

By Mr. DORF:

Q. Do they handle any civilian or commercial cargo for commercial firms?

A. Not that I know of.

Q. Do you know that you have to approach the steamship companies after your submission for the allocation of space?

97 A. What do you mean by approach?

Q. Approach them; apply them in person in addition to the, let us say, seeking space?

A. I don't know of any such procedure.

Q. You don't. Are you aware of the necessity of getting the ODT permit from the ODT, and what procedure to adopt?

A. I have been asked that before.

Q. Do you know what the procedure is after you do get the permit from the steamship company?

A. No.

Mr. McGRAH. I would like to bring out what this War Shipping Board is and what they do. He is an expert.

The EXAMINER. You cannot do that at this hearing.

Mr. McGRAH. Then what have this gentleman as an expert here?

The EXAMINER. He is an expert witness for the Maritime Commission, because he has had considerable experience in the cargo business.

Mr. McGRAH. I am with the Maritime Commission 100 percent, but I really think it ought to be brought out what work they do, if he is an expert.

98 The EXAMINER. Let us proceed with the hearing.

Mr. CAPALDO. I would like to ask some questions as to the liability of the freight forwarder after the documents have been completed.

Mr. KRISEL. I object to that type of question. What has reliability to do with this examination in any way? It is a conclusion of law.

Mr. CAPALDO. After the documents are completed in New York the responsibility ceases.

The EXAMINER. That is a statement, not a question. Have you any further questions?

By Mr. CAPALDO:

Q. Will you tell me the instance where a freight forwarder is responsible for the delivery of merchandise at the destination?

A. I would not say he was responsible.

The EXAMINER. Let us clarify that point. You told me a while ago that a freight forwarder might have an agent in a foreign country, and the goods were delivered to his agent there?

The WITNESS. That is right.

99 The EXAMINER. And that is agent thereupon was responsible for the delivery of the goods to the consignee?

The WITNESS. That is right.

By Mr. CAPALDO:

Q. Would you consider that the practice or an isolated case, Mr. Witness?

A. I would not say that was the practice.

The EXAMINER. Any further questions?

By Mr. BRAUNER:

Q. Are you aware of the fact that the handling of freight-forwarding business in the private industry is entirely different than the forwarding and handling in your organization?

A. Yes, sir.

Q. Your answer is "yes, sir"?

A. Yes, sir.

(Witness excused.)

Mr. ATHA. Mr. Examiner, may I make a motion now that the testimony of Mr. Dow be stricken from the record in view of the fact that he has not been shown to be qualified to testify as to the matters on which he has been called?

The EXAMINER. The motion will be denied.

Mr. ATHA. Exception.

100 Mr. McGRATH. I object to that being stricken from the record. I think it should be in there.

The EXAMINER. I have just overruled his motion.

101

## UNITED STATES OF AMERICA

## UNITED STATES MARITIME COMMISSION

WASHINGTON, July 8, 1943.

I hereby certify that the annexed is a true and correct copy of an extract from the minutes of a meeting of the United States Maritime Commission held August 21, 1942, as shown by the official minutes of the United States Maritime Commission on file in the United States Maritime Commission.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States Maritime Commission to be affixed, on the day and year first above written.

[SEAL]

A. J. WILLIAMS,

*Acting Secretary,**United States Maritime Commission.*102 EXTRACT FROM THE MINUTES OF A MEETING OF THE  
UNITED STATES MARITIME COMMISSION

AUGUST 21, 1942.

Docket No. 621—Port of New York freight forwarder investigation

There was presented a memorandum dated August 17, 1942, from the Director, Division of Regulation, submitting the following proposed order and explaining the circumstances in connection therewith:

"ORDER"

"At a Session of the United States Maritime Commission, held at its office in Washington, D. C., on the — day of — A. D. 1942

No. 621

## Port of New York Freight Forwarder Investigation

"It appearing, That each of the persons named in Appendix A herein carry on the business of forwarding in foreign commerce and that each of them is an 'other person subject to this Act' within the meaning of that term as used in sections 4 and 17 of the Shipping Act, 1916, as amended;

"It further appearing, from information before the Commission that Foreign Freight Contractors, Inc., in connection with the receiving, handling, storing or delivery of cargo and freight in

foreign commerce, issues contracts under guise of bills of lading, although not a carrier; purports to establish freight rates; and engages in other acts and practices with respect to contracts it makes with shippers and the method of assessing and collecting its charges, all of which appear to be in violation of section 17 of the Shipping Act, 1916, as amended; and

"It further appearing, That the public interest requires a general inquiry to determine the extent of the existence of the said practices among all other forwarders in the port of New York subject to said Act, and the lawfulness of said practices under section 17 thereof;

"It is ordered, That the Commission upon its own motion and without formal pleading enter upon an investigation concerning the lawfulness of the rules, regulations, practices and operations of said forwarders named herein, with a view toward making such order or orders or taking such other action in the premises as may be warranted by the record.

"It is further ordered, That all forwarders named in Appendix A herein be, and they are hereby, made respondents in this proceeding.

"It is further ordered, That a copy of this order be served upon each of said respondents; and

"It is further ordered, That this proceeding be assigned for hearing at such times and places as the Commission may hereafter direct.

"By the Commission.

[SEAL]

\_\_\_\_\_, Secretary."

Appendix A referred to in the foregoing order is as follows:

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APPENDIX A

Allen, John D.	Baltic Shipping Co.
American Bluefriesvrem Inc.	Barr Shipping Co.
American Despatch Agency	Behring Co., P. R.
American Express Co.	Benkhart & Co., F. J.
American Shipping Co.	Bernard & Co., Inc. J. E.
American Union Transport Co.	Berner & Co., A. V.
Andrews, D. C.	Bernstein, H. Z.
Xsche & Co., Inc. Chas. H.	Black & Geddes
Atlantic Forwarding Co., Inc.	Block & Co., John
Atlas Forwarding Co.	Bluefries, New York Inc.
Austin Baldwin & Company	Bolton & Mitchell Inc.
Baker, Irons & Rockstader, Inc.	Bowen, A. E.
Bane & Co., William	Brauner & Co.
	Bridgetts & Co., Inc.

Broderick & Co., Edw. P.  
Brown & Reese  
Bruemmer & Ackerman  
Burdett, Inc., Daniel H.  
Bryant & Heffernan Inc.  
Byrnes & Lowrey  
Caldwell & Co., Inc.  
Carlsen, H. R.  
Carter & Caulfield  
Carter Shipping Service, L. M.  
Carney, M. J.  
Cavanaugh Shipping Co.  
Chelsea Forwarding Co.  
Coford, A. F.  
Colony Shipping Co., Inc.  
Comstock & Theakston Inc.  
Consmiller, Inc., L. A.  
Cook & Sons, Thos. Wagons  
Ltd., Inc.  
Copeland Shipping Inc.  
Copex Co., Inc.  
Corbett & Co., M. J.  
Cox & Fahner  
Davies, Turner & Co.  
Dearborn & Co.  
De May & Co., Inc. A. J.  
D. L. & W. R. R.  
Doherty, George F.  
Dorf & Co., Inc., H. S.  
Downing & Co., Inc., R. F.  
Draeger Shipping Co., Inc.  
Drew Shipping Co.  
Dumont Shipping Co., Inc.  
Dunlap, Alpers & Mott  
Dyson Shipping Co., Inc.  
Eagle Commercial Corp.  
Eberlein, J. G.  
Errion Co.  
Excel Shipping Co., Inc.  
Export-Import Services, Inc.  
Farris & Co., Inc., M.  
Faunce Inc., John H.  
Foreign Shipping Co., Inc.  
Franklin & Co.  
Freedman & Slater, Inc.  
Freighting Corp. of America  
Fulton Freight Forwarding  
Co.  
Gallagher & Asche Inc.  
Gallie Corporation  
Gaskell, Fred P. Co., Inc.  
Gavin, J. J.  
Gaynor & Co., Inc. P. A.  
General & Hey Co., Inc.  
General Shipping & Trading  
Co.  
General Transport Co., Inc.  
Gertzen, Kerer Co., Inc.  
Globe Shipping Co., Inc.  
Godwins Samuel & Sons  
Gogarty, H. A. Inc.  
Gonrand Shipping Co., Inc.  
Grant & Co., Inc., C. S.  
Gray, R. M., Inc.  
Greene, R. L.  
Grodywohl, G. & Son  
Hampton, J. W. Jr., & Co.,  
Inc.  
Happel, Charles  
Hayes & Streeter  
Haynes & Co., C. A.  
Heemsworth-Kerner, Corp.  
Heiman W. International  
Transportation Service, Inc.  
Henjes, Frederick Jr.,  
Inc.  
104 Hennington, E. Co., Inc.  
Hensel, Bruckmann &  
Lorbacher, Inc.  
Hill, F. Murray  
Holdom & Son  
Hirsbach & Smith, Inc.  
Holt & Co., C. J.  
Hudson Forwarding & Ship-  
ping Co.  
Hunter & Son, Inc.  
Hunter, T. T.  
Hurley, Richard J.

Independent Forwarding Co.	Munn & Jenkins
Inge & Co., Inc.	Murray & Co., A. J.
Inter-Maritime Forwarding Co.	Murphy, J. J. & Co.
International Forwarding Co.	Nelson, Fred O. & Co., Inc.
Jarrett & Willenbacher	Neth, W. P. & Co., Inc.
Judson Sheldon Corp.	New Netherland Co., Inc.
Karr, Ellis & Cö., Inc.	Niebrugge & Day, Inc.
Keating & Co., Inc., W. R.	North American Forwarding Co.
Keer, Maurer & Co., Inc.	Norton & Ellis of New York, Inc.
Kersten Shipping Agency	N. Y. & Overseas Shipping Co.
Kilroy, John F.	Nydegger & Co., A. E.
Kraemer, F. L. & Co.	Oceano Shipping Co., Inc.
Kramer & Hauser	Old Colony Forwarding Co.
Lambert & Barrows	Overton & Co.
Lansen-Naeve, Corp.	Pacific & Atlantic Shippers Association
Leading Forwarders, Inc.	Paragon Forwarding Company
Leonhardt & Bush	Pearson & Co.
Lippelgoes, George C.	Perry, Ryer & Co.
Lo Curto & Funk	Person & Weidhorn
Love, E. C.	Peterson, C. E.
Luigi Serra, Inc.	Phoenix Shipping
Lunham & Moore International Corp.	Pitt & Scott Corporation
Lunham & Reeve, Inc.	Pomerance, S. H. Co., Inc.
Maguire, Philip Co.	Powell, C. H. Co.
Majestic Shipping & Forwarding Co.	Premier Shipping Co.
Major Forwarding Co.	Puerto Rico Shippers Service
Markland Landau Co.	Redde Forwarding Co., Inc.
Marks & Coyle, Inc.	Reliance Shipping Service
Marks, Ernest E.	Reynolds, J. L. Freight Corp.
Maron & Schaefer	Rex & Reynolds
Marti, F. & Co., Inc.	Richards Shipping Co.
Masiller & Co.	Rietman-Pilcer Co.
Massie & Co.	Robinson, H. W. & Co.
Massee & Co., Inc.	Rogers, L. F.
Masters & Co., J. W.	Rogers, John C.
McGrath & Co., T. J.	Rohner, Gehrig & Co.
Meadows, Wye & Co., Inc.	Runspaden, C. F. & Co.
Michelson & Sternberg	Ryder, C. C. & Co.
Mohegan International Corp.	Santos, E. L. & Co.
Moody & Co., H. E.	Saunders, R. J. & Co., Inc.
Morris, A. J.	Schneider Bros., Inc.
Moritz, Leonard W. & Co.	

Schmidt, Pritchard & Co., Inc.  
 Seven Seas Mercantile Transportation Co., Inc.  
 Shippers Storage Co., Inc.  
 Shore, John J.  
 Smith, Theodore B. & Co.  
 105 Smith, W. O. & Co., Inc.  
 Snedeker, Milton Corp.  
 Stern, Steiner & Co.  
 St. John, H. W. & Co.  
 Taub, Hummel & Schnall, Inc.  
 Thomas & Pierson, Inc.  
 Timm, Charles H.  
 Titan Shipping Co., Inc.  
 Tornabell, Ernest  
 Transatlantic Shipping Company  
 Transship, Inc.  
 Triad Shipping Co.  
 United Shipping Corporation  
 United States Forwarding Company

United States Freight Co.  
 Universal Transcontinental Corp.  
 Vandegrift & Co.  
 Van Oppen & Co., Inc.  
 Victory Shipping Co.  
 Wallace, F. E. & Co., Inc.  
 Ward, James E. & Co.  
 Webb's Service  
 Wedemann & Godnecht, Inc.  
 Wehling, R. C. & Co.  
 Weiss Forwarding Co.  
 Werckle & Galgano  
 Whitehall Shipping Co.  
 Willis & Cupitt  
 Wilson, A. S.  
 Wood, J. B.  
 Wynne, Thomas J.  
 Young, Daniel F., Inc.  
 Young, Daniel F., Inc.  
 Foreign Freight Contractors, Inc.

After discussion, \* \* \* the order as above set forth was adopted.

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### UNITED STATES OF AMERICA

#### UNITED STATES MARITIME COMMISSION

WASHINGTON, July 13, 1943.

I hereby certify that the annexed is a true and correct copy of a memorandum dated August 17, 1942 from R. H. Hallett, Director, Division of Regulation, to United States Maritime Commission re Docket 621, which was approved by United States Maritime Commission August 21, 1942, the original of which is on file in the United States Maritime Commission.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States Maritime Commission to be affixed, on the day and year first above written.

[SEAL]

A. J. WILLIAMS,  
Acting Secretary,  
United States Maritime Commission.

## 107 UNITED STATES MARITIME COMMISSION

## INTER-OFFICE MEMORANDUM

AUGUST 17, 1942.

**To:** U. S. Maritime Commission.**From:** Director, Division of Regulation.**Subject:** Docket No. 621—Port of New York Freight Forwarder Investigation.

On April 30, 1942, the Commission received a letter from Angier Chemical Company, Boston, Mass., complaining against Foreign Freight Contractors, Inc., a forwarder in foreign commerce located at New York, N. Y., for refund of alleged overcharges in connection with a shipment of medicine from New York to Dublin, Eire, involving transhipment at Liverpool which left New York via the Cosmopolitan Line on or about July 23, 1941.

An informal investigation of the complaint reveals that Foreign Freight Contractors, Inc., although not a carrier, issues contracts under guise of bills of lading, and has established a practice of quoting and collecting charges designated as freight rates, but which include services not usually included in freight rates. All of these charges appear to be based upon guess work and are made high enough to assure a profit on the various services and transportation factors. No attempt is made to account to customers for actual expenditures made on their behalf or to itemize the forwarder's charges for the separate services performed. It is intimated by Foreign Freight Contractors, Inc., that its practices and methods are observed generally among other forwarders in the port of New York.

108 I have advised complainant that his remedy against the forwarder is in a court of competent jurisdiction in an action on contract. However, I deem it in the public interest and for the protection of shippers, steamship companies, and legitimate forwarders that an investigation be made by the Commission of the rules, regulations, practices and operations of the forwarders in the port of New York, with a view toward making such order or orders or taking such other action in the premises as may be warranted by the record.

Recommendation: The attached order should be adopted by the Commission.

(Sgd.) R. H. HALLETT,  
R. H. Hallett,

Director, Division of Regulation.

Attachment.

No legal objection.

(Signed) WADE H. SKINNER,  
Wade H. Skinner,  
*General Counsel.*

R. M. Furniss: mt.

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## In United States District Court

[Title omitted.]

*Affidavit of Harold L. Allen*

Filed Jan. 8, 1944

STATE OF NEW YORK,

*County of New York, ss:*

Harold L. Allen, being first duly sworn, deposes and says:

That he is an attorney at law of the State of New York, duly admitted to practice before this Court, and is the attorney for American Union Transport, Inc., and the other plaintiffs herein.

Since the argument of this case, certain facts have come to the attention of your deponent, bearing upon the decision in this case, which should be brought to the attention of the Court.

On the 9th and 10th days of August 1943, an investigation was held by a subcommittee of the House Committee on Small Business into the activities of the Maritime Commission in attempting to conduct the investigation now under consideration by the Court. It was charged that such investigation constituted an harassment of small business. In the course of such investigation, Ralph H. Hallett, Director of the Division of Regulation of the United States Maritime Commission testified as to the circumstances under which this investigation was begun, and the evidence before the Commission upon which it made its alleged finding of fact contained in the order of August 21, 1942.

110 An official transcript of this testimony was obtained and a copy of the testimony of Mr. Hallett made therefrom. This testimony is respectfully submitted herewith. The copies of the testimony herewith submitted have been compared by your deponent with the original transcript and are, to the best of his knowledge, true and correct copies thereof. Sworn to before me this 3rd day of September 1943.

[SEAL]

HAROLD L. ALLEN,  
MARGARET L. MOEBUS,  
*Notary Public, Kings County, N. Y.*

111 *Statement of Ralph H. Hallett, Director of the Division of Regulation, United States Maritime Commission, Washington, D. C.*

The CHAIRMAN. Will you identify yourself to the Reporter and for the benefit of the Committee.

Mr. HALLETT. Mr. Ralph H. Hallett Director of the Division of Regulation, United States Maritime Commission, Washington.

The CHAIRMAN. Mr. Hallett have you any statement that you care to make to the Committee with respect to the testimony?

Mr. HALLETT. I have no written statement, but I think I would like to make an informal statement.

The CHAIRMAN. We would be delighted to have any expression from you that you might consider helpful to the Committee in an attempt to be of some assistance.

112 Mr. HALETT. I think I have got to make a statement because I have been very much the target of the shots that have been put across here.

Mr. DULLIGAN. Mr. Hailett, would you commence by telling us just how this investigation started? Would that be a good starting point?

The CHAIRMAN. I think you should let Mr. Hallett say what he wants.

Mr. HALLETT. May I?

Mr. DULLIGAN. I certainly would circumspect him.

Mr. HALLETT. May I clear up some points which I think have resulted in considerable confusion and misunderstanding even on the part of these forwarders.

The Maritime Commission is restricted very much with respect to its jurisdiction over forwarders. As a matter of fact, it is restricted very much in connection with its jurisdiction over carriers engaged in foreign commerce. And it is perfectly plain and obvious as to why there is that distinction between carriers engaged in foreign commerce and carriers engaged in interstate commerce, because in the former there are always two nations interested in that rate.

The result is we have no jurisdiction whatsoever over the level of rates by carriers in foreign commerce. We have, 113 therefore, no power to tell a carrier whether a rate is reasonable or not.

We also have no jurisdiction with respect to the level of rates of forwarders. And the purpose of this investigation is not to determine whether their rates are proper, reasonable, and so forth. Our jurisdiction is limited to determining whether or not they are conducting their business in a way to eliminate possible discriminations as against their customers.

Our only interest in and our only power to control is from Section 16 in which other persons subject to the Act are included, which covers the granting of undue preference or prejudice to one customer, to the undue advantage of another customer.

Or under Section 17 with respect to unfair practices which might be discriminatory or unfair as between shippers or ports or parts other people mentioned in the Act.

So we are not attempting to tell these carriers what they could charge and in no way. We would not be authorized to do so. Then, also, I think it should be pointed out that we are only empowered to regulate forwarders with respect to their actual forwarding in connection with foreign countries.

114 We are not—we have no power to control them with respect to their brokerage or any other matters, but you have clearly seen that there is a great deal of confusion as to what forwarding actually is.

The purpose of my investigation is to find out what forwarding is, because until we can limit and find out what that is we don't know, and wouldn't be empowered to issue any rule or regulation against these people unless that is first determined, and that is one of the primary reasons and purposes of this investigation, and the first step that we have to determine before we go any further.

Then with respect to the other services that they may render would be divorced from the forwarding unless it was shown that by a portion of or operation of those contiguous or collateral services they were utilizing them for the purpose of giving a big shipper an advantage over a little shipper, or something of that sort. Or that there was a discrimination.

The only thing we tried to find out is whether the practices have resulted in and are resulting in discriminations.

115 The CHAIRMAN. What practices do you mean specifically, Mr. Hallett? Do you know of any practices that might tend to be discriminatory?

Mr. HALLETT. I don't like to answer that question definitely. No, I don't; because if I answered it that way you would say that we have without a hearing prejudged the matter, but we have indications that there may be opportunities for correction of these discriminations and when you find on a waybill of one of the carriers definite items for their services, and then over in the fine print among their rules and regulations, which unfortunately almost nobody ever reads, I find a statement that they reserve the right to increase their charges for freight rates and other services rendered, and that such increases will be added to the increases in their profits, that indicates that there is no way in which anybody could tell how much has been added to those charges. And therefore—

The CHAIRMAN. By the forwarder?

Mr. HALLETT. May I finish?

The CHAIRMAN. I want you to finish but I don't want to lose you.

Mr. HALLETT. Yes. And therefore there is a wide open door for the discrimination right there, and for a big customer who they have been dealing with right along they may add none of

116 those profits or extra charges, whereas to a casual person they may add, shipping the same things in competition with this other company, a substantial amount, and the person doesn't know how much he is charged.

I have no objection, and as a matter of fact I have no brief against these forwarders. I believe just as much as they believe that they are performing a very necessary job.

I think that we should take the same position that the British and other maritime nations have taken, and that is to keep as far as possible this industry going, and I want them to be able to get an adequate compensation for every service that they render.

I am wondering, however, whether it is a healthy situation when they do not indicate to their customers what their charges are actually. For instance, if one of them goes out and hires a truck-man and renders a charge for trucking, I think it is a healthier situation for him to say to his customer so much—my charge, my expenses were so much for trucking, my charge for handling the trucking so much, and then the customer knows exactly what he is paying for and how much he is paying for that service. And it enables all of them to know whether or not they are paying an

adequate price or an excessive price and whether or not that 117 charge is more or less of a uniform one to all other customers in a similar situation.

The CHAIRMAN. I am glad to hear—

Mr. HALLETT. It may be as the last witness said that this is so involved that it is impossible to regulate. I don't know. That is what we are trying to find out—the whole purpose of the thing.

The CHAIRMAN. In this connection may I interrupt to ask this question: Do you know of any other country in the world that has assumed to regulate the industry of freight forwarding along lines that are apparently contemplated in this proposed, pending proceeding of your Commission?

Mr. HALLETT. Unfortunately, Mr. Chairman, I did not write the law. I didn't put the obligation on myself. I didn't argue it. I found it. The Congress has done it.

In answer to your question, I know of no other maritime nation in the world that regulates their carriers in foreign commerce or domestic commerce to the same extent that the United States does.

The CHAIRMAN. Let me develop that for a moment if you please.

Since you have presently jurisdiction over the carriers and the rates they charge—

Mr. HALLETT. Not the rates.

118 The CHAIRMAN. You do not have jurisdiction over the rates that the carriers charge?

Mr. HALLETT. No. No. That is one of the confusions that has grown up. We don't have.

The CHAIRMAN. Why should your complaint with respect to lack of jurisdiction be directed towards this segment of the transportation of goods or the carriers?

Mr. HALLETT. I am sorry. I didn't hear that.

The CHAIRMAN. Hasn't the Interstate Commerce Commission effectively prevented discrimination between shippers of domestic goods?

Mr. HALLETT. The Interstate Commerce Commission has jurisdiction over all water carriers in the coastwise and intercoastal line and the inland waterways, and they have the same authority over the rates of those carriers as they have over the rates of the railroads. That is a general statement.

There may be some slight difference in the wordings of the Act. I have not studied it. We still have jurisdiction over the rates of interstate carriers and can control them when they are serving our territories and island possessions.

We have no control over the level of rates where two nations are involved as they are in all foreign commerce.

119. The CHAIRMAN. Is it that control that you are seeking? Do you seek that control?

Mr. HALLETT. No. We don't seek that at all. The only thing that we have a right to do with one exception, which I will explain to you in a few minutes, is to prevent carriers and other persons subject to the Act from performing certain unfair practices which gives one customer a right, a preference over another customer, and that is practically the limit of our jurisdiction in foreign commerce.

That one exception, and that is Congress has seen fit and I believe properly to continue the conference association, the conference system, and allow carriers, whether engaged in foreign commerce or interstate commerce in the territorial matter to combine for the purpose of controlling competition, of fixing rates, hence pooling, without being subject to the Antitrust Act, providing those agreements under which they are acting are submitted to the Maritime Commission and pro—and approved, and receive the approval of the Commission, and those conferences are subject to the supervision of the Maritime Commission.

And if rates are such as to result in detriment to the commerce of the United States, then the Commission has the power to 120 disapprove the agreement, and they can no longer act in concert without being subject to the Antitrust Act.

Now the forwarders and the other persons subject under the Act also have that same power for forming conferences, and if they

do form an agreement or a conference or whatever it may be called and fix or agree among themselves with respect to rates or anything of that sort, then they are subject to Section 15 and maybe subject to the same control over those rates and supervision of the rates and their practices.

Mr. HALL. Mr. Hallett, I have always admired and had a great deal of respect for the Maritime Commission, and my attitude has not changed yet.

Mr. HALL. How long have you been connected with it?

Mr. HALLETT. I have been connected with the Maritime Commission and the predecessors ever since 1921.

Mr. HALL. I don't like the looks of this questionnaire. This Committee has studied questionnaires sent out by different government bureaus for the past year or so, and frankly speaking I prefaced my remarks about the Maritime Commission because I feel there are many Bureaus in Washington which are deliberately interfering with small business and not aiding them in any way. In fact I think we have some men connected with Bureaus in Washington who feel that the government should take over business.

121 Mr. HALLETT. I am very glad you asked that question. I don't like questionnaires any more than you do.

The Maritime Commission hasn't exercised its power under Section 21 in the years that I have been there more than I think twice before this one. We have —

Mr. HALL. Well —

Mr. HALLETT. May I finish please?

Mr. HALL. Yes.

Mr. HALLETT. We have always endeavored in every way that we could to prevent issuing any such thing as that.

I had one case, or one man took one of the questionnaires up, or a Section 21 order that I was involved in, up to the Supreme Court and unfortunately we received a favorable decision. But we are not in favor of the Section 21 orders.

We have not the same power that the Interstate Commerce Commission does of setting up a set of books and requiring them to follow the form, or of going in and looking over those books, that the I. C. C. does, and our only means, our only way of getting information is either through voluntary action on the part of the people who are subject to our Act—and I will say that we have almost never failed to receive that voluntary action—or to issue one of these orders or to subpoena them with a subpoena duces tecum at the hearing.

122 Now we did receive indications from many of the people that they were perfectly willing to cooperate and to give us the information.

I had no brief against the National Forwarders Association—if that is the correct title. In fact, I am glad that they did what they did, because they have put it up to the Court to determine whether I had jurisdiction. If the Court says I have no jurisdiction, then that is one less headache that I have. If they say I have jurisdiction, then I got to go ahead.

Mr. HALL. Let's get back to the question I asked.

Mr. HALLETT. I know. I am getting to it.

We want to push this thing along. Their attorney came and talked with me, and it was a question of this questionnaire, and also he mainly, what he wanted, was to have the whole thing dropped. First, because we did not have jurisdiction.

I said that is a question for the Court.

Second, because he didn't think it was the time for doing it, but they wanted and under those circumstances they were willing to sit around and talk to us around the table but not to give us any information.

Now it was up to me to determine whether or not we could go ahead in the ways that we could, or take his attitude.

123 And I told him that we would have to issue an order. I told him, however, that we would cooperate in every way, shape, and manner to try and relieve the burden off these people.

Have had the other members of the association come in without Mr. Allen, the attorney, and others who were not of the association to talk with me about it. And to every one of them I have said, "If you will tell us what the practices were with respect to the way you bill your thing—I mean passing on whether—I am not passing on whether it is proper or not, but if you will tell us what the practice is, give us an opportunity if we want to—of sending somebody in to check a few items on your books to see whether or not your books coincide with what you tell us the practice is, you can forget all the questionnaires because all we want is the ultimate facts."

Mr. HALL. You have listened to the testimony of the various forwarders and that they have said that this questionnaire would cost anywhere from five hundred up to four thousand dollars. Do you wish to make any comment with respect to those estimates?

Mr. HALLETT. I think with respect to the second part of it, I think they are very much inflated, but with respect to the first one, might have been so on the large companies who were doing a very extensive business.

124 Now I have been challenged with getting this thing up and it being a very low conceived questionnaire and it was done without any assistance from any forwarder or anything of that sort. That is not so.

Mr. HALL. Who prepared the questionnaire, if you care to say?

Mr. HALLETT. It was prepared I think first in New York and submitted down to me. I went over it very carefully with a war shipping administration official forwarder who was in charge of their forwarding end, and he went over it and made suggested changes and then gave it his approval.

Mr. HALL. But usually these questionnaires are prepared in the first instance by someone. Do you care to tell us who prepared it in the first instance?

Mr. HALLETT. I think Mr. Kreisel did.

Mr. HALL. I see.

Mr. HALLETT. But I am not sure.

Mr. DULLIGAN. Was Dr. Cerbes consulted in connection with the preparation?

Mr. KREISEL. He was consulted in the first instance.

Mr. HALLETT. I don't know. I never saw Dr. Cerbes.

Mr. DULLIGAN. Who is he?

Mr. HALLETT. As far as I know he was someone who came 125 over here from England or Germany, and I don't know, was represented as a teacher of forwarding in New York University.

The only thing I know about him is that I authorized paying up to \$100 for a compilation of the list of forwarders that he was supposed to have prepared and kept up to date. And that is the only information I have about him.

We purchased the thing and made such use of it as we could and as far as I was concerned he dropped out of the picture.

Mr. HALL. Was it useful?

Mr. HALLETT. Well I am speaking from hearsay. I was given to understand that it was not useful.

Mr. HALL. If you had known that Dr. Cerbes had had something to do with the preparation of this questionnaire, after getting this information about its usefulness, would it have changed your attitude?

Mr. HALLETT. At that time I didn't know much about him.

Mr. HALL. If you did know after receiving this other information from Dr. Cerbes, would your attitude have changed in any way with respect to this questionnaire, if you had known he assisted in the preparation of it?

Mr. HALLETT. No. Because I went over it myself. I am taking the full responsibility for it.

126 Mr. HALL. I am sure you are like I am. I have listened here and I certainly do not understand the forwarding business and I doubt if I alone could prepare a questionnaire like this, and certainly someone had something on his mind and had something in view when he prepared these questions.

Mr. HALLETT. I was told that it was prepared from a group of bills, vouchers, that had been submitted by the forwarders themselves, and that these items were taken off as the items which appeared in their bills rendered to their customers.

And then I went over it, and as I say, I conferred with the one forwarder that we had which was available to me at the time, and got his approval of it.

Mr. HALL. Let's get a little bit more about Dr. Cerbes. How long had he been in the country? Do you know?

Mr. HALLETT. I don't know anything about him.

Mr. HALL. Was he a citizen of the United States, or is he a citizen of the United States?

Mr. HALLETT. I don't know.

The CHAIRMAN. Was he employed by the Commission?

Mr. HALLETT. No.

The CHAIRMAN. He is not an employee of the Commission?

Mr. HALLETT. No. Never. That is he was not employed by me, or I had nothing to do with it. I don't know anything about his employment by anybody else.

127 Mr. HALL. Mr. Kreisel did say he worked with him in the first instance in the preparation of this questionnaire. Did you know anything about that?

Mr. HALLETT. No.

Mr. KREISEL. I said I consulted with him. That is about all he had anything to do with. He had nothing to do with the actual suggestions of any of those items on there. I take the responsibility of having prepared it. I tried to find out what he knew, but he didn't know anything about it, so I let him go.

• The CHAIRMAN. Did you pay him for the services he rendered?

Mr. KREISEL. He was paid \$100. And when I found out later that he didn't know anything, I let him go.

Mr. DULLIGAN. That is \$200 he received?

Mr. KREISEL. All his compensation all told, was \$100.

Mr. DULLIGAN. That included the giving you advice on the preparation of this questionnaire?

Mr. KREISEL. For whatever it was worth.

The CHAIRMAN. Did you authorize Dr. Cerbes to represent you in interviewing any members of the industry?

Mr. KREISEL. I did not. That is one of the reasons I let him go, besides the fact that he didn't know anything.

128 The CHAIRMAN. Who told you to consult with anyone like Mr. Cerbes?

Mr. KREISEL. Mr. Cerbes wrote a letter to the Maritime Commission in October offering his services as an expert. I didn't know anything about him. When I came to New York I consulted with

him and I thought I could make some use out of him and when I found I could not make any use out of him I let him go.

Mr. HALL. Who let him go?

Mr. KREISEL. I let him go.

Mr. HALL. Or did you let him go, Mr. Hallett?

Mr. HALLETT. He was not, as far as the record goes and as far as my own information goes, he was not on the pay roll of the Maritime Commission. The only that that I authorized was the payment up to \$100 for a certain compilation which we believed would be of value in preparing this case.

Mr. HALL. At least this Dr. Cerbes attempted to render more service to the Commission for that one hundred dollars than you have mentioned. To use Mr. Kreisel's own words, he was consulted in the first instance on the preparation of the questionnaire. Did you know when it happened?

Mr. HALLETT. No. I knew he was in and out of the office up there. That is, I got word that he had been up there trying to still continue, but I didn't know anything about anything else.

The CHAIRMAN. Do you care to tell us how the proceeding was initiated, or why it was initiated?

Mr. HALLETT. Yes. I received a complaint with respect to a charge that had been made by a forwarder and they wanted to file a formal complaint. After looking it over I came to the conclusion that the arrangement as was made between the forwarder and his client was a contractual matter and that if there was any breach of contract it was something for the Courts and not of a regulatory nature, and I told him so.

However, in looking over the papers I was very much struck with the fact that in the first place the forwarder was issuing what purported to be a bill of lading and looking on its face as though it was a bill of lading, but tucked away down in small print on the bill of lading was a statement to the effect that this was not a bill of lading and carried no obligation thereunder.

He also was charging a rate of \$2.90, I think, per hundred pounds and a ceiling had been put on the rate by W. S. A. of 90¢ plus a surcharge which brought it up to \$1.10, and it was all 130 lumped together in a rate which made the whole thing look as though this carrier was engaged in the transportation business.

The CHAIRMAN. The carrier or the forwarder?

Mr. HALLETT. The forwarder. Pardon me.

I then got very much interested in that and wrote to them for an explanation. He gave me a break-down of how he got to his two dollars and ninety cents. I then started to determine—and he also said "this is the general practice."

I knew that we had no—had made no investigation of forwarders. I wanted to find out whether that practice was prevalent from the forwarder in the War Shipping Administration. I went to the attorneys, the Admiralty attorneys in the Maritime Commission, to find out, because I knew that they were dealing with forwarders right along, to find out if it was a general practice, and you can't be in my job very long without getting a great deal of gossip and rumor going around, and I knew I had heard a great deal of gossip and rumor in connection with the practices of some of the forwarders.

I conferred with Mr. Woodward, the Commissioner, on the matter and it appeared that perhaps there was considerable opportunity for discriminations and violations of the Act by reason of the practices. And also an opportunity by reason 131 of their lumping all their items in the way they do to vitiate in large measure the attempts that both the Maritime Commission and the War Shipping Administration were making to keep freight rates from spiralling to the stratosphere, as they did in the last war.

So I recommended this general investigation into it. I had nothing except a belief that probably there were vices in this industry that perhaps needed to be brought out to the light of day and that we might find—and I don't know yet whether those were of a nature which we could prevent.

As soon as it were issued, I received calls from forwarders and they confirmed me in it, in my determination. Those that came hated to see it take place. They all impressed upon me that there was this very strict, I mean extensive competition between the members, and that as a result of that competitive practices had grown up, particularly by those who came in from other countries, had come in recently and so forth, which they deplored, but which unfortunately they had followed and been forced to follow by reason of the competition.

We heard a lot about the competition but they have not any of them said to you, as they had to me, the existence of these 132 practices, and they said—I don't think there was but one—who didn't admit that it was going to be a healthy thing for their organization but that they hoped or rather regretted that we had to drag it out into the open.

Unfortunately, I can't do anything and issue any orders or regulation under the law except at a public hearing, and I think that is proper.

The CHAIRMAN. Mr. Hallett, are you convinced that the questionnaire that has been submitted for response is such a questionnaire as will give you the picture of the industry from which you might proceed?

Mr. HALLETT. Oh, I doubt it. I don't know of any person that could ever draw a questionnaire that will bring out all of the facts.

And I hope that after the court has decided whether or not we have jurisdiction that we will be able to get together with these people and get the facts away from the—whether from the questionnaire or other means, but these people are not subject to that questionnaire now until after the court has made its decision.

The CHAIRMAN. You heard the testimony yesterday. I think it was stated yesterday that the only ones named in the 21 Order were those who indicated that they would not file the questionnaire. The other respondents were omitted from that order; isn't that true?

Mr. HALLETT. Yes; but it was—originally it was confined to this association. Those were the ones who had clearly indicated that they were not going to give it to us any other way.

The CHAIRMAN. They you added a few others.

Mr. HALLETT. Then when we found out others were not, we added others.

The CHAIRMAN. As I recall the figures, they may not be accurate, but there were about ninety-six or ninety-four respondents named in the 21 Order. There are how many now—two hundred?

Mr. DULLIGAN. Eighty-five and three hundred and thirteen forwarders.

The CHAIRMAN. Three hundred and thirteen forwarders named in the proceeding. It would seem to follow, therefore, that the difference between the three hundred and thirteen and the number named in the 21 Order were those who indicated that they were going voluntarily to file the questionnaire.

Mr. HALLETT. Right.

The CHAIRMAN. Have you received those questionnaires?

134 Mr. HALLETT. I can't answer that question. Those things are being handled up here. They came to me and I am not keeping a count of them.

The CHAIRMAN. Would you have a rough estimate of the number of questionnaires you have had filed with you?

Mr. HALLETT. Well you see—

The CHAIRMAN. How many respondents have you?

Mr. HALLETT. The questionnaire was gotten up in rough form first. Then it was made a part of the Section 21 Order. Now how many of them have filled that other form out—

The CHAIRMAN. It was made a part of the 21 Order but that 21 Order was directed only to those respondents who indicated that they were not going to voluntarily file a questionnaire.

Mr. HALLETT. Right.

The CHAIRMAN. So I am directing my inquiry to those other respondents.

Mr. HALLETT. I know.

The CHAIRMAN. How many questionnaires have been filed with you by those other respondents?

Mr. HALLETT. I can't give you that answer. I don't know.

135 The CHAIRMAN. Could you find out?

Mr. DULLIGAN (looking through exhibits). It is nowhere in here.

Mr. KREISEL. Sure. I know.

Mr. DULLIGAN. How many?

Mr. KREISEL. Twenty-seven.

The CHAIRMAN. Twenty-seven out of —

Mr. KREISEL. Out of about one hundred and fifty or one hundred and seventy-five that were circulated.

Mr. HALLETT. Of course an explanation of that was that as soon as it got into the court, we held up any requiring of any of them to file or to try to get it, because we didn't want to put the others in a worse situation than the ones which were held up by reason of being in the court.

The CHAIRMAN. Mr. Hallett, would you be good enough if you can explain to us why that Section 21 Order was directed only to a segment of the industry or part of the industry?

Mr. HALLETT. Because they were the ones who had clearly indicated that they were not going to comply. The others had not. They had all indicated that they were going to comply.

The CHAIRMAN. And out of those one hundred and 136 seventy-five who indicated that they were going to comply, we just heard that only twenty-seven have been filed.

Mr. HALLETT. They were filed before the time was extended in the Court.

The CHAIRMAN. Those twenty-seven?

Mr. HALLETT. Yes. And then we didn't get any more or ask for any more from them because we didn't believe it was proper to put them in a worse position than the ones who had gone into court. We don't have any venom or antagonism against the men going to court.

The CHAIRMAN. I am trying to get a picture of the situation. You were not going to put those who indicated they they were going to file the questionnaires but di' not in any worse position than those who indicated that they would not file the questionnaire.

Mr. HALLETT. No.

The CHAIRMAN. Yet prior to the issuance of the 21 Order directed toward those who clearly indicated that they were not going to file the questionnaire, the others had not voluntarily filed it though?

Mr. HALLETT. No.

The CHAIRMAN. Why were they not included in the 21 Order because up to that time they had not filed the questionnaire?

137 Mr. KREISEL. I think the question should be directed at me.

Mr. DULLIGAN. We will call you in due time, Mr. Kreisel, please.

Mr. HALLETT. I suppose we took them at their word.

Mr. DULLIGAN. Mr. Chairman, may I make this observation: I have the records of the Maritime Commission with respect to this whole proceeding. And I have not come across any poll which was taken in these, of these various forwarders as to who would comply and who would not on which this 21 Order would apply.

If Mr. Kreisel has it; I would be glad to have it.

Mr. KREISEL. Yes; I have it.

Mr. DULLIGAN. Why didn't you submit it? I subpoenaed all the papers.

Mr. KREISEL. You only got samples from our file.

Mr. DULLIGAN. I subpoenaed the complete record.

Mr. KREISEL. As I understand it, when Mr. Goertner delivered the papers to you pursuant to your subpoena, he told you it was not all the papers in the New York office.

138 Mr. DULLIGAN. I never remember any such statement. The CHAIRMAN. We are not going to permit any colloquy between one who is not good enough to give us the benefit of his long experience and interest in the subject.

(Discussion held off the record.)

The CHAIRMAN. Do you think that all the items contained in this questionnaire might properly be described as phases of the business of forwarding, Mr. Hallett? As phases of the business of forwarding?

Mr. HALLETT. Do I think it what?

The CHAIRMAN. Do you think that all of the information sought in this amended questionnaire concerns phases of the business of forwarding?

Mr. HALLETT. I think they include phases. I don't say they include all of them.

The CHAIRMAN. Take for example an item—I will pick it out at random. You seek information with respect to insurance. I assume that you are trying to find out what the practices in the industry are when they handle insurance for their customers?

Mr. HALLETT. Right.

The CHAIRMAN. Isn't that a matter which is properly under the jurisdiction of the proper board, dealing with insurance—the Insurance Department of the State of New York?

139 Mr. HALLETT. With respect to certain aspects of it, yes; but with respect to the services he performs as a forwarder, which is as far as I have ever been able to find out, was to procure insurance and as they testified here, then it becomes a question of their acting as a forwarder.

The CHAIRMAN. I appreciate that, but the information sought in the questionnaire is insurance. "Marine-War-Advance-Billed."

Mr. HALLETT. Right.

The CHAIRMAN. That would seem to indicate that your Commission would want from the industry information A, how much it paid for insurance, and B, how much it charged for insurance;

Mr. HALLETT. Right.

The CHAIRMAN. Now it seems to me that that is a matter that certainly is directful under the jurisdiction of the Insurance Department of the State of New York and in that view I am somewhat fortified by the fact that your Commission communicated with the Insurance Department of the State of New York and in a letter addressed to that department under date of March 23rd of this year said:

"It has come to my attention that many of the Freight Forwarders in connection with their business make advances for insurance premiums and pa'd the premiums 10% or 20%."

140 Now what I am trying to find out is, is that a conclusion founded on information obtained from the industry or is it a state of mind that your attorney had for which he was seeking justification?

And further—further than that, if it is a matter regarding irregularities with respect to insurance, why should your Commission ask the Insurance Department of the State of New York to investigate the industry and you do it too?

Why should American business and industry be exposed to that two-fold attack on precisely that same subject. That is what this Committee wants to know.

Mr. HALLETT. I suppose the only way I can answer that question is that there may be a double violation of the same Act, and if there is a double violation as is sometimes disclosed from an act which I discover and sent over to the Treasury Department for their information.

I don't think that it is proper to isolate every department of the government and not assist other departments of the government.

The CHAIRMAN. I agree with you, but I think at the same time the Departments of Government should not attempt to dissect the

American businessman and cause him to respond here one day and there the next on precisely the same matters.

141 This was. These men—

Mr. HALLETT. There again, Mr. Chairman, as I explained in my opening statement, we are only trying to find out what the facts are. I am only interested—as a matter of fact, I don't think I wrote that letter.

Mr. DULLIGAN. No.

The CHAIRMAN. No.

Mr. HALLETT. And I don't think I ever saw the letter until after this thing. But I might very possibly have. The information had come to me in which I thought that perhaps the Insurance Department of the State of New York was interested and have referred it to them for such action as they wanted to take, if any.

The CHAIRMAN. Under date of June 4th your Commission wrote the Department inquiring as to what action was taken by that Department.

Mr. HALLETT. Who signed the letter, may I ask?

The CHAIRMAN. Maurice A. Krisel, Attorney. I will read it: "Referring to our several conversations concerning investigation into the insurance practices of foreign freight forwarders in the port of New York, I should appreciate your advising 142 me as to the action taken by the department in connection therewith."

Was that in furtherance of any plan to regulate the industry to prevent discriminatory practices?

Mr. HALLETT. Right. Yes.

The CHAIRMAN. It sounds to me more like the urging on the part of one agency of government to a department of another sovereign government to take positive action.

I don't see how that is in furtherance of your whole plan in attempting to regulate those persons subject to your Act.

Mr. HALLETT. All I understand from that is he was trying to find out what their records showed with respect to what the charges actually were which had been made by the forwarders in connection with insurance.

Now, if they were going to conduct an investigation on their own, that is one thing. If they were going to join in here to find out whether or not any provision of their Acts had been violated, that was another thing.

But all we wanted was the facts from the insurance people as to what the charges were and then what charges had been made to the forwarder's customer.

The CHAIRMAN. You wanted action.

143 Mr. HALL. Your letter seemed to indicate—

Mr. HALLETT. Please don't say my letter.

Mr. HALL. Well the Commission's letter signed by Mr. Krisel. Isn't the ordinary inference with respect to different departments when they find a matter which they think should come to the attention of the different department that they put it in proper form? Do you follow it up with every other department?

Mr. HALLETT. Not unless I want information.

Mr. HALL. That is not a question of information. I can't understand your going to the Superintendent of Insurance and attempting to find out whether complaints have been filed against freight forwarders.

Mr. DULLIGAN. They have done that.

Mr. HALL. They have done that. That is in one letter, but your Commission now writes:

"\* \* \* I should appreciate your advising me as to the action taken by the department in connection therewith."

Now do you follow up every situation as detailed as that?

Mr. HALLETT. No.

Mr. HALL. I am just wondering why it was done in this instance.

144 Mr. HALL. I don't know.

Mr. HALL. Did you ever receive any response to that inquiry?

Mr. DULLIGAN. The Superintendent of Insurance said that they had received no complaints with respect to freight forwarders overcharging on insurance.

The CHAIRMAN. And the files so indicate?

Mr. DULLIGAN. And the files so indicate. But I think that the purpose of that was to stimulate a separate investigation on the part of the Superintendent of Insurance directed towards the insurance features of the freight forwarding business.

Mr. HALL. What is your basis of information which you just gave us? I think that the information should be put in the record as to the basis for your statement there.

The CHAIRMAN. What is the date of that letter from the Superintendent of Insurance? Can you find that?

Mr. DULLIGAN. I think it is a blank memorandum.

The CHAIRMAN. What is the date of that?

Mr. DULLIGAN. I don't think it is in those. I think it is in that Docket 621.

Mr. HALL. Off the record.

145 (Discussion held off the record which the reporter was ordered not to take.)

The CHAIRMAN. Is there any question on the part of the Commission that the Superintendent of Insurance indicated that there were no complaints filed?

Mr. KRISEL. That is not true. There are only four letters involved and you have them all.

Mr. DULLIGAN. You have the originals.

Mr. KRISEL. No; you have the originals.

Mr. GOERTNER. I don't recall whether I gave you originals or copies.

Mr. HALL. Let's make, Mr. Chairman, the letter from the Maritime Commission dated June 4th to the Department of Insurance, and the letter dated March 23, 1943, signed by Mr. Krisel to the Superintendent of Insurance, a part of the record at this point. And Mr. Dulligan, if you find the answers in those regards insert those in the record at this same point.

The CHAIRMAN. Yes.

(Documents being letters of June 4th, 1943, and March 23, 146 1943, previously referred to marked as "Exhibits O and P" respectively as of this date.)

Mr. KRISEL. For the record, I just want to clear this point on these two letters. There were two letters written by the Insurance Department to me. The first was in answer to my first letter advising me I should go to the Complaint Bureau at 111 Broadway. The other letter explains the action taken by the Insurance Department in response to my request as to what action they had taken.

The CHAIRMAN. Do you remember the substance of the letter from the Insurance Department stating what action they had taken?

Mr. KRISEL. The substance was that they decided to institute their own investigation.

The CHAIRMAN. And in spite of that you included in your questionnaire a request for information on precisely the same subject.

Mr. HALLETT. I apparently cannot make myself clear but the issuing or the procuring of insurance apparently is one of the forwarders service which they offer, and it was necessary if we are going to check up these various things by the questionnaire to find out whether or not they were charging the same amount that it cost them to get it or whether they were charging them an additional amount or whether they were charging or putting down what it actually cost them and then putting down an actual amount for the service in getting it.

And that is all our interest in it. There is no question of illegality on the part of the forwarders in doing this thing.

From our particular point of view the only purpose of it is to lay the foundation, if at all, in a determination as to whether the practice is a proper practice.

The CHAIRMAN. Probably denotes your legality, doesn't it, was improper.

Mr. HALLETT. Generally it does, although occasionally the Maritime Commission has gone so far as to indicate in a final report that a certain practice which is not violative of any one of the particular provisions is a practice which apparently is not one that can really be approved. Now we don't issue in those cases, we cannot issue any order on those people to correct the practice, but we can at least point out that we think it is an improper practice. I don't know whether this is or not.

Mr. HALL. Let me put it this way. I think you said that you wished the members of the business would come around 148 and sit around the table with you and give you the facts.

Mr. HALLETT. Yes.

Mr. HALL. Don't you feel it would have quite a bearing on their willingness to do that, that and their attitude, when they know that you are writing to the Department of Insurance and suggesting that there is illegality taking place?

In other words, your letters don't state facts. So I am just wondering whether or not you are building up an atmosphere by that method where groups can get together and submit all of the facts to which, to each other, which I feel is what you want to do; isn't that so?

Mr. HALLETT. I think that when this legalistic atmosphere is cleared up by the courts that mos' of this thing will go out of the window.

The CHAIRMAN. Apparently from that letter, which is now in the record, the first one sent to the Insurance Department, your Commission had information that at least prompted you to the conclusion that there were illegal practices.

Mr. HALLETT. I take it from that letter that there were—but I don't know whether there were illegal practices.

The CHAIRMAN. Your statement in the letter is that they were padded ten or twenty percent. That is the word "pad."

149 You and I know what the word "pad" means when used in that sense.

Mr. HALLETT. Yes; and apparently there was some evidence to that effect. I don't know whether—

The CHAIRMAN. What further evidence would you require from those whom you seek the information except perhaps cumulative information? It apparently wouldn't change the situation.

Mr. HALLETT. It may be that we have sufficient information from some of these. I don't know. But we cannot go ahead with our case because of the existence of the court proceedings at the present time, and I don't know whether we have sufficient evidence at that. On how wide spread that practice may be, we perhaps may not have any information.

The CHAIRMAN. The question that keeps recurring to me is, that if you had information on that and any other subject covered in

your questionnaire, I question the wisdom and the necessity of imposing upon businessmen who are trying to stay in business, as has been indicated in the testimony throughout, this further burden of responding to a questionnaire.

We will questionnaire businessmen out of business if we don't stop.

Mr. HALLETT. They are not under that particular burden and I don't think they are going to be under the particular burden of answering that questionnaire.

150 The CHAIRMAN. I am delighted to hear that.

Mr. HALLETT. Because I think the thing, after we find out whether we, where we are with respect to the law, and I have told them, everyone that has come in to me, and I want this impressed and want it on the record, I have told everyone that came into to me that they wouldn't have to bother with the questionnaire if they tell us what their practices were and give us an opportunity to check it with their records to see that their records are so.

Mr. HALL. Mr. Hallett I want to say this, and you have been very frank with us and have expressed that attitude, but don't you think that letters addressed to the Superintendent of Insurance, don't you think that a sort of prosecution attitude has been pursued here? I know governmental departments when they start out to regulate, they start out first to indict.

Now what other attitude can the businessman assume when they know this is going on with respect to the Insurance Department? Do you think that indicates that they should come in and unburden themselves to you when on the other side of the picture letters are going out of your office such as have been introduced here?

Mr. HALLETT. They were not mine.

151 Mr. HALL. Don't you think those letters indicate a prosecution attitude in this proceeding? You don't need to comment on it if you don't wish to.

Mr. HALLETT. I hope they don't.

Mr. HALL. They speak for themselves.

Mr. HALLETT. It has been my one desire to get away from prosecution or persecution.

Mr. HALL. The letters speak for themselves.

Mr. HALLETT. Yes.

Mr. DULLIGAN. Mr. Hall, may I make this observation with respect to this subject of cooperation and seeking the cooperation and the aid of these various forwarders, that I have a witness here who attended the meeting of another association that was formed, and the terms upon which this association was formed was to cooperate with the commission in working this thing out.

This gentleman happened to be a member of one association and attended this meeting at which Mr. Krisel addressed the meeting, and Mr. Krisel despite all this talk about cooperation and

looking for the help of everyone in this industry refused to address the meeting while this man was in their number, or any other member of this New York Freight Association was present, and this man was ordered out of the room.

152 Have you any comment to make on that procedure or practice if you are looking for the cooperation of businessmen?

Mr. HALLETT. Well, I don't know all of the circumstances. I know that it has always been my practice to cooperate just as much as I could. As a matter of fact on these questionnaires, in order to assist them, I sent a man from Washington up there to go over and to try to work out a system with these forwarders.

Not only that, but Mr. Woodward met one of the forwarders at his solicitation in New York and suggested methods whereby perhaps conferences could be held in Washington in order to work out a system of cooperation, but unfortunately they did not feel that they could join in, and that was the last we heard of it.

But I have done everything I can to assist these people and to take any of the burden off of them and all I wanted was sufficient facts upon which we could either determine we had no occasion for an order or an order supported by sufficient facts.

The CHAIRMAN. Do you want to interrupt Mr. Hallett for a moment and put the other witness on in connection with that conference you spoke about?

Mr. HALLETT. I prefer, if I can, to finish because I have to get back. I have two conferences tomorrow.

153 The CHAIRMAN. Mr. Hallett, my colleague is faced with the necessity of leaving now, and I was wondering whether it would be convenient for you and the rest of us to recess now for lunch and come back say at two o'clock?

Mr. HALLETT. Certainly.

The CHAIRMAN. All right, then, the Committee will recess until two o'clock.

(Whereupon a luncheon recess was declared from 12:40 o'clock to 2:00 o'clock p. m.)

(The meeting reconvened pursuant to adjournment at two o'clock p. m.)

#### Statement of Ralph H. Hallett Continued

\* \* \* \* \*

The CHAIRMAN. Go ahead Mr. Hallett:

Mr. HALLETT. There are only one or two other things that I think perhaps should be of interest to the Committee.

In drawing up the list of respondents in the case, every effort was made to get an accurate list, but apparently it didn't exist. We wrote to the New York office of the Maritime Commission which is supposed to have a list of the forwarders and received a list from them. I also wrote to the New York Freight Forwarders Association and asked them if they had any additional lists, and we received additional names from them.

It was found that a good many people on the list that was there were either out of business or had changed over from forwarders to freight brokers and were only engaged in the import business and not the export, and we tried our best to make up an accurate list. I wouldn't want to say that we have all the forwarders even at the present time.

155 At the present time I don't remember of any other things that I—with respect to the inference that there was anything misleading in our first questionnaire which was sent out to the members, it of course was also designed to find out whether we did have an accurate list. I rather resent the implication because I think if you study the questionnaire that was sent out, although they were asked whether they were engaged in the forwarding business in connection with water transportation in foreign commerce, the next question asked, if I recollect correctly—I have not seen it for a long time [Mr. Dalligan hands paper to Mr. Hallett] was, "Itemize in detail the services you perform as a forwarder with particular reference to the receiving, handling, storing, or delivering of cargo forwarded." That was I think an exact copy; I don't think it was even a paraphrase of the words of the statute.

The CHAIRMAN. Which statute?

Mr. HALLETT. And it gave them, I think, a perfect opportunity to put in anything that they wanted with respect to the answering of this questionnaire, and I cannot see how there is any implication that it was either misleading—tended to be misleading or could have mislead them in any way, shape, or manner.

156 The CHAIRMAN. When you say the statute, do you mean the Shipping Act?

Mr. HALLETT. Yes; the Shipping Act of 1916.

The CHAIRMAN. From what you know of the nature of the business of the respondents, Mr. Hallett, you would not say that they hold themselves out to transport property. They are not carriers?

Mr. HALLETT. No; but in connection with the transporting.

The CHAIRMAN. And they provide no facilities for wharfage or warehousing?

Mr. HALLETT. No.

The CHAIRMAN. Have you experienced the same difficulty that apparently the Committee has in determining just what a forwarder is?

Mr. HALLETT. I certainly have.

The CHAIRMAN. Do you not think it would be helpful to everybody if we could attempt somehow to accomplish a definition of that term so that everyone would understand it?

Mr. HALLETT. With all due deference, I don't know whether we could do it at this particular place and time. The Court undoubtedly has to consider that matter because if they are not engaged in the forwarding described in the Act then we have no jurisdiction.

The CHAIRMAN. That's right.

Mr. HALLETT. If they say we have, that we come to assume the jurisdiction and issue any orders, I think it will be one of our duties to come to a definite determination of what services do come within the statutory description.

The CHAIRMAN. But conversely you would not contend that, would you, if one phase of the business might be within the statute that all phases of the business are?

Mr. HALLETT. Oh, no.

The CHAIRMAN. That is the question I got from this questionnaire, frankly.

Mr. HALLETT. I tried to explain as to why those were included, because if the forwarders are using those other services as a means of preferring unduly or discriminating unduly between their customers, which is the same as in the Interstate Commerce Act, if a carrier undertakes to give a shipper an undue preference by reason of something extraordinary, like giving them free meals at their restaurants of the Santa Fe or something of that sort, it is 158 within their jurisdiction to prevent those preferences.

Not that they have any jurisdiction over the running of those rails, but if they are using them as a means or a device, as the Act calls it, to get around the equal treatment to all customers, then the Interstate Commerce Commission or we would have an opportunity and a duty to correct that situation.

The CHAIRMAN. Well do you think that even assuming everybody who might be directly or remotely connected with the business of forwarding were to answer this amended questionnaire that from those answers you might get any knowledge with respect to—

Mr. HALLETT. I would say that that questionnaire is not at all conclusive and that we might have to get additional information.

The CHAIRMAN. You mean they might have to answer another questionnaire?

Mr. HALLETT. I hope it won't be in the form of a questionnaire, because I don't like that. As a matter of fact nobody has ever been able, in all my experience, been able to draw a questionnaire that is either conclusive or—well, I almost said intelligent.

The CHAIRMAN. I think you mentioned earlier today,  
159 Mr. Hallett with respect, or spoke with respect to a Committee that came from Washington to interview the forwarders.

Mr. HALLETT. What did you say? I wasn't paying attention.

The CHAIRMAN. Did you make any reference to an interview or conference that the forwarders in New York had relative to the subject generally?

Mr. HALLETT. I said that Mr. Woodward had a conference in New York. I think it was only one forwarder. I don't think it was any group, but he suggested that a group might be formed to come down and he would be very glad to confer with them and with me to see how this thing could be worked out.

The CHAIRMAN. Did anything ever come of that?

Mr. HALLETT. No. The matter was in the hands of the Court at that time, and I think they probably felt that it was not the time in which to try to work out any system.

The CHAIRMAN. You referred to the receipt by you of a complaint from a shipper who claimed he had been overcharged. Has the Commission received any other complaints with respect to the practices in the industry?

Mr. HALLETT. Since the institution of the investigation; yes.

160 The CHAIRMAN. How many about, do you know?

Mr. HALLETT. Oh, I should say I think about, so far as have come to my attention, I should say about ten.

The CHAIRMAN. That is involving about ten transactions?

Mr. HALLETT. No. Unfortunately some of them have come from South American countries in which they point out a specific instance and then say that this practice is also apparently more or less prevalent and is causing considerable difficulty. That is one of the difficulties in saying how many complaints have been received.

The CHAIRMAN. Have you any suggestions that you would like to make to this Committee by way of suggested legislation or any other steps that this Committee might take to be of assistance to both the Commission and to this industry?

Mr. HALLETT. No; I wouldn't want to do that now because I don't think it would be fair to the industry itself. I am not sufficiently informed as to their—to what forwarders do.

The CHAIRMAN. And what forwarders are.

Mr. HALLETT. And of their practices, and if I tried to make any such suggestion I think it would put me in a very unfair light and put them in a very unfair light.

161 The CHAIRMAN. But you do agree with the statement that has been made generally that the industry of forwarding is a necessary part of our foreign commerce?

Mr. HALLETT. I wouldn't quarrel with them for a minute because as a matter of fact I stepped out of turn in order to save the payment of brokerage although I had no jurisdiction over it except through conferences that there was a--well I would say a feeling among certain people that brokerage under the present war conditions was an unnecessary payment, and I feel the same way about forwarders.

The CHAIRMAN. Do you have any knowledge with respect to what the practice, or I suppose I might better describe it, what the governmental attitude of other countries is with respect to their forwarding industry?

Mr. HALLETT. So far as I have been able to gather from my observations and talks with carriers and conferences with shippers, I think they have fostered forwarders. I am quite sure the British have. I know they have their brokers, and I have the same feeling, that in order to remain competitive with those people we have got to do the same thing.

The CHAIRMAN. And you do not know of any attempt on the part of any other country to regulate by legislation or by administrative rules the industry of forwarding, do you?

162 Mr. HALLETT. Not in the way we are doing it; no.

The CHAIRMAN. I have no further questions, Mr. Hallett, and I would like to say for the Committee, and I think I speak for my colleague, that we are grateful to you for your assistance here, and we feel confident if in our consideration we might have need to call upon you for further consideration that we may feel free to do so.

Mr. HALLETT. Oh, certainly.

The CHAIRMAN. I am sure that we are all seeking after the same objective, and I hope we all accomplish it.

Mr. HALLETT. I don't see any difference between us.

Mr. DULLIGAN. May I clear up a couple of points with Mr. Hallett?

The CHAIRMAN. Yes.

Mr. DULLIGAN. Mr. Hallett, I notice in going over the files here that some of the reports that were prepared for you in connection with this matter were made by Mr. Basham, G. O. Basham, who is here, and as a matter of fact I think one of the reports recommending that this investigation be instigated was signed by Mr. Basham, which is perfectly proper, of course.

But I also notice that this hearing was held with Mr. Basham sitting as the trial examiner.

163 I am wondering whether you care to express an opinion to this Committee in view of the criticism made by the Attorney General to that practice, that is a person acting in an administrative capacity who would also sit as a trial examiner.

Mr. HALLETT. We are just as much against that as the Attorney General's office.

Mr. DULLIGAN. But it was done in this case.

Mr. HALLETT. In this particular case, as I remember it, Mr. Basham was away on leave at the time this was being considered by me, and it was handled by me with Mr. Furness, who was Mr. Basham's assistant, and before it got to the Commission the matter was practically all drawn up, but Mr. Basham came home from his vacation, and in the usual course of business signed the letter as the administrative head of the formal docket section.

At that time the matter had been assigned to one of the other examiners to study and unfortunately due to war pressure and the fact that I lost one of my examiners to the Navy, and was cut down in personnel, and a case arose which required immediate attention in Boston, the man who had been previously assigned to this case was assigned to the other one, and I had perforce of certain circumstances to assign this case to Mr. Basham.

164 Mr. Basham had no dealings in connection with the preliminary investigation finally resulting in the determination to recommend it, and signed it only as an administrative officer as something that was put over his desk.

Mr. DULLIGAN. This is no criticism of Mr. Basham, and I don't think you could have picked a better man to act as trial examiner. But there is nothing to indicate your explanation in the record. I was just curious here, in going through the record, I notice these reports that this investigation be instituted, and commenced by the Commission, signed by Mr. Basham.

Mr. BASHAM. May I see that? I think you are wrong.

Mr. DULLIGAN. Come over here. There are several here. I just noticed this.

Mr. BASHAM. Where is the recommendation to the Commission that the order be made up? You see I recommended originally—

Mr. DULLIGAN. Off the record.

(Discussion was held off the record which the Reporter was ordered not to take.)

165 Mr. BASHAM. I was on my vacation when this recommendation was made to the Commission that the investigation be instituted, and I did not take charge of the case

until September 10, 1942. That was about—the order was issued August 21, 1942—sometime during the next month.

Mr. DULLIGAN. As I said, there was nothing in the records. These records have your typewritten name on there as emanating from your office.

Now with respect to the complaints that were filed, Mr. Hallett, I think the record should show in view of the statement made here by Mr. Byrne that these freight forwarders in the aggregate handle thousands and thousands of shipments so that over a period of years they run into millions. It does seem quite significant to me in subpoenaeing your complete file there isn't any more than you say. You said ten. There is about fourteen complaints that were made as a result of this investigation and everything else by shippers.

Mr. HALLETT. I want to correct the statement to one extent. I did not even have the fourteen at the time I recommended the institution of the investigation. It was even worse, if you want to put it from that point of view, than what you are quoting. I will admit that there have been very few complaints.

I think, however, that the information which was given to me by the forwarders—this is after the institution of it—showed that the institution of it was entirely justified.

And I did not have definite complaints.

As I said before, you cannot be in an office like mine, dealing with shippers and carriers and other people interested in the transportation problem continuously without hearing a great deal of rumors and gossip, and I didn't pay attention to them very much until something comes up that brings them to a head.

Unfortunately for this industry, unfortunately I think, something did come up that I thought justified the institution of this complaint. And please don't get the idea that the Commission is a rubber stamp for what my recommendations are, because they are not.

They are the ones who finally have to take the responsibility, and they are men who are cognizant of their responsibilities. So that the institution of this was not only on my recommendation but was after due consideration by them.

The CHAIRMAN. I assume that both you in making your recommendation and the Commission in ordering the proceedings considered the element that has been raised in the testimony of some with respect to the timeliness of it?

Mr. HALLETT. Yes.

167 The CHAIRMAN. And also with respect to the expense involved on the part of those who would be subject to the inquiry?

Mr. HALLETT. I will be perfectly frank with you on that and

say "no." We had no means of knowing what the expense would be because in the first place none of us were prescient enough to foresee the questionnaire, and I or we didn't have any idea as to what the expense of this particular thing would be on the industry.

Mr. HALL. Has the testimony here given you any ideas with respect to the cost of answering the questionnaire?

Mr. HALLETT. As originally drawn; yes.

Mr. HALL. As to the amended questionnaire.

Mr. HALLETT. Oh, somewhat. Yes. But I think I am still convinced that the estimates are fairly high. On the high side, I don't think they tried to help me out very much.

Mr. HALL. Even if the figures given by the members of the industry are high, it would still make the cost of preparing the answers to the questionnaire an appreciable amount.

Mr. HALLETT. Oh, yes; if they all have to do it.

Mr. HALL. And considering the fact that this is one industry that has been hard hit by the war, don't you think that is a factor that should be taken into consideration when you contemplate issuing a questionnaire like that? And to carry it further. And if you do reach the conclusion—you say you had no knowledge before—but if you do now reach a conclusion that it is an expensive item so far as business is concerned, to answer this questionnaire, do you think you should still prosecute the idea?

Mr. HALLETT. Well I can only answer it in this way.

We have a statutory duty to perform and I am under an oath to perform that duty, as is also the Commission.

In order to perform that duty we have to have certain facts. If we can get these facts without a questionnaire, all well and good. I am not sold on the questionnaire. I am not insisting upon the questionnaire, so long as we can get the facts. If we cannot get the facts other than through the questionnaire, I am afraid we will have to go through the questionnaire in order to perform our necessary statutory duty.

I am hoping that it won't be necessary.

Mr. DULLIGAN. Mr. Hallett, on the question of the questionnaire—and I am not going to clutter this record—but in going over Docket 621 which was very voluminous as you know, I extracted therefrom letters received by the Commission together with a copy of their replies, which I say would make quite a volume in itself here; where you received letters from various people, for instance those who admitted that they were forwarders or which were sent, and for other reasons were unable to comply with this thirty-day period in which to file this questionnaire and others who denied that they were forwarders and begged off, in each instance they were told that they must com-

ply with the Section 21 Order and file the questionnaire under this penalty of one hundred dollars a day.

Mr. HALLETT. I am not sure of that. As I remember it most of the replies which emanated from our office referred the matter to New York, and I sent a man up there to see what he could do to assist these people in either complying or to make reports in respect to the inability of complying.

I don't remember that I told them that they had to comply and quoted the penalty clause.

Mr. DULLIGAN. Well, I have them right here.

Mr. HALLETT. It may be—my memory is—I have not seen those things for quite some time, and I may be at fault, but that is my recollection, and I think you will find that a great majority of them were answered in that way.

Mr. DULLIGAN. I see here some of them deny that they were forwarders and talked of not filing this questionnaire, and 170 were told to file them anyway.

Mr. HALLETT. All we wanted them to do was to file under oath a statement that they were not forwarders and state what they were doing. In that case they wouldn't have to file any data if we were convinced that they were telling the truth. And we took them, most of the time, as indicated in our change of respondents; took them at their face value.

Mr. BASHAM. I think he is talking about the first questionnaire, not the Section 21 Order.

Mr. HALLETT. I think that is probably where the confusion lies was with respect to the reply to the first questionnaire.

The CHAIRMAN. That first questionnaire is not part of the record?

Mr. HALLETT. What?

The CHAIRMAN. That first questionnaire is not part of this record. That was the preliminary questionnaire.

Mr. HALLETT. Right. And I think that most of the letters to which he refers has to do with that particular item and all they had to do was to say "we are not forwarders; we are entirely freight brokers or something else, or out of business."

The CHAIRMAN. And most of those who received those 171 questionnaires responded?

Mr. HALLETT. Oh, yes.

The CHAIRMAN. So that the industry has filed one questionnaire, however formal or short it might be?

Mr. HALLETT. Yes.

The CHAIRMAN. Thank you very much, Mr. Hallett.

I think I should in the presence of my colleague acknowledge the appreciation of your assistance.

Mr. HALL [In which I concur.  
(Witness excused.)]

173 In United States District Court

[Title omitted.]

*Affidavit of R. H. Hallett*

Filed Dec. 6, 1943

DISTRICT OF COLUMBIA.

*City of Washington, ss:*

Ralph H. Hallett, being duly sworn, deposes and says:

I am and have been, since March 1941, the Director of the Division of Regulation of the United States Maritime Commission (hereinafter called the "Commission") and submit this affidavit in order to clarify some erroneous impressions which may possibly be obtained from a reading of the memorandum submitted on behalf of the plaintiffs in the above entitled action. I have carefully read said memorandum as well as the affidavit of Harold L. Allen and the attached purported transcript of my testimony before a special subcommittee of the House Committee on Small Business at hearings held in the City of New York on August 9 and 10, 1943. At such hearings the attendance of several witnesses on behalf of the Commission was requested but I alone was called as a witness by the Committee.

174 In the memorandum referred to excerpts are taken from my testimony which are extremely misleading. I call attention particularly to the testimony set forth on pages 23 and 24 and in the footnote on page 6. The plaintiffs seek to make it appear that the Commission had no basis whatsoever for commencing the investigation sought to be enjoined but was guided solely by gossip and rumor. A reading of the entire testimony refutes this suggestion. The gist of that testimony and the facts regarding the background of the investigation are as follows:

As Director of the Division of Regulation it is my duty to keep myself informed regarding the practices of carriers and other persons subject to the Shipping Act, 1916, as amended, and other regulatory statutes administered by the Commission; to make such preliminary investigations as I deem advisable; and to receive complaints, both formal and informal, from carriers, shippers, or any other person who may be aggrieved concerning practices of those who are subject to the Commission's jurisdiction. It is my further duty to handle specific complaints directed at any person subject to the Act as well as rules and regulations of general application and to make recommendations to the Commission as to

the institution of investigations under the pertinent statutes. The Commission thereupon considers my recommendations as well as any other information which may be before it, or which may be a matter of its own knowledge and determines whether an investigation should be commenced.

175 Shortly after I undertook the duties outlined above I had a number of discussions with persons in the shipping industry concerning the practices of foreign freight forwarders. I recall specifically that I talked with the chairman of one of the more important steamship conferences regarding the so-called "contract rates." I was informed, among other things, that it was a common practice among forwarders to sign a contract with a carrier, under the terms of which the forwarder would be entitled to a lower rate if it undertook to utilize exclusively, for a certain period of time, the services of those carriers constituting the conference. The forwarder, on the other hand, would charge its customer, the shipper, the higher noncontract rate and thus would profit to the extent of the difference in rates. Talks with other persons in the industry confirmed my impression that an investigation regarding the practices of forwarders should be had, but the war situation delayed any immediate action on my part. When the complaint regarding Foreign Freight Contractors, Inc., came before me (which complaint is referred to at pp. 187-188 of the transcript and considered at some length at the hearing before the Examiner, a copy of which testimony was submitted to the Court on the argument of the motion), it appeared evident that the practices of forwarders might have a very serious effect on our war effort and on the policy of the Government to prevent transportation costs from reaching the excessive levels attained during the first World War. This situation required a decision on my part as to whether or not these practices should be investigated immediately and whether I should recommend such

176 an investigation to the Commission. Before recommending any action by the Commission, I took steps to determine the extent of the practices in the industry to enable me to determine whether a general investigation was imperative or whether the matter should be limited to the specific forwarder complained against. I discussed the situation with a forwarder employed by the War Shipping Administration, and consulted the Assistant Director of Traffic of the War Shipping Administration—both of whom had knowledge of the practices of foreign freight forwarders and had been in the steamship industry for many years. I also consulted several admiralty lawyers employed by the War Shipping Administration whose past experience appeared to me to qualify them as being able to give me definite information as to the practices of forwarders. The knowledge which I gained as a result of these inquiries fully verified the impressions I had previously received, and thereupon I recom-

mended to the Commission that the investigation be undertaken. Although, on August 21, 1942, when the investigation was first ordered by the Commission, only one specific complaint had been received, immediately after the Commission's first order a number of specific complaints were received from shippers, consignees abroad and other governmental agencies concerned with foreign commerce. When I mentioned "gossip and rumor" in my testimony I referred to the situation prior to the time of the receipt of the complaint against Foreign Freight Contractors, Inc., mentioned above and the discussions referred to.

177 On December 9 and 10, 1942, hearings were held by the Commission in connection with these proceedings, at which hearings testimony was adduced regarding improper practices of the forwarders and the prevalence of such practices. As is indicated by the exhibits already filed with the court, additional evidence of such practices has now been obtained and, although the Commission has not in any sense prejudged the issues before it, there appears to be sufficient proof to indicate that violations of the Act may be prevalent throughout the industry.

In the footnote on page 6 of the plaintiffs' memorandum reference is made to my statement that it is difficult to frame a definition of "freight forwarder." I wish to point out that this statement was made by me in my capacity as an official of an administrative agency and that I did not wish to be placed in a position of already having determined which of the activities of the forwarders came within the purview of the Act and which of them were not within the Commission's jurisdiction. Furthermore, the answer was given in connection with a line of questioning which was directed toward the practical aspects of regulation. Regardless of the legal meaning of the word "forwarder," regulation is an intensely practical matter and will require the Commission to make a careful determination as to the scope of the exercise of its jurisdiction. I did not mean to convey to the Committee or to anyone else the impression that I did not believe that the plaintiffs were not engaged in the business of forwarding within the meaning of the Act.

178 The information which I obtained prior to the submission of my recommendation that the present proceeding should be undertaken not only convinced me that there were adequate grounds therefor, but also that the investigation was necessary in the public interest. A considerable proportion of the foreign commerce of the United States is conducted through the medium of freight forwarders, and their activities affect to an important degree the position of the United States as a maritime nation both in peacetime and during the present war period. Because of the volume of business handled by forwarders it is possible for them to give unreasonable advantages to particular

persons, localities, and types of traffic to the prejudice of the entire country in so far as our foreign commerce is concerned.

The hearings before the Committee have not been concluded and the Commission has not as yet been afforded an opportunity to present its complete views regarding this matter.

(S.) Ralph H. Hallett.

RALPH H. HALLETT.

Sworn to before me this 18th day of September 1943.

[NOTARY SEAL]

JENNIE G. AIRONSTEIN,

Notary Public.

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In United States District Court

[Title omitted.]

*Notice of motion for reargument*

Please take notice that on the annexed affidavit of Ralph H. Hallett, sworn to the 7th day of December 1943, and on all the papers, pleadings, exhibits, and proceedings heretofore had herein, the undersigned will move the Honorable Thomas W. Swan, Honorable Francis G. Caffey, and Honorable Alfred C. Coxe, constituting a special court appointed pursuant to a certain order dated February 12, 1943, on the 16th day of December 1943, in Room 506 of the United States Court House, Borough of Manhattan, City and State of New York, at 4:30 o'clock in the afternoon of said day, or at such time and place as the aforesaid court may designate, for leave to reargue a certain motion made pursuant to a notice of motion dated July 2, 1943, and on such reargument for a modification of the opinion rendered by said Court under date of November 30, 1943 to the extent that said opinion directs that an interlocutory judgment against enforcement of the order of the United States Maritime Commission dated May 18, 1943 should be granted, and for an order directing that summary judgment be entered in favor of the defendant, and such other and further relief as to said Court may seem just and proper.

Dated New York, N. Y., December 9, 1943.

Yours, etc.,

JAMES B. M. McNALLY,

United States Attorney for the Southern District of New York, Attorney for Defendant; Office and Post Office Address: United States Court House, Foley Square, Borough of Manhattan, City of New York.

To HAROLD L. ALLEN, Esq.,

Attorney for Plaintiffs,

30 Rockefeller Plaza, New York, N. Y.

## In United States District Court

[Title omitted.]

*Affidavit of R. H. Hallett.*

## DISTRICT OF COLUMBIA,

*City of Washington, ss:*

Ralph H. Hallett, being duly sworn, deposes and says:

I am and have been since March 1941, the Director of the Division of Regulation of the United States Maritime Commission (hereinafter called the Commission), and submit this affidavit in support of a motion for reargument made on behalf of the defendant, and on such reargument for an order dismissing the complaint and directing summary judgment in favor of the defendant.

The opinion of this Court dated November 30, 1943, directs that the complaint, insofar as it seeks an injunction against the order of August 21, 1942, should be dismissed, but it also grants an interlocutory injunction against enforcement of the order of May 18, 1943, and denies defendant's motion for summary judgment. It is respectfully submitted that on the basis of the opinion rendered by the Court, no interlocutory judgment should be granted, and that the complaint should have been dismissed in its entirety.

The opinion sets forth that the business conducted by the plaintiffs is described in detail in the affidavit of Herbert A.

182 Byrne, attached to the motion for an interlocutory judgment, and that there was nothing before the Court "which contradicts in any essential respect his statements." The conclusion is then reached by the Court that the "forwarder acts solely as agent for the owner of goods in procuring their transportation by a common carrier by water and in performing services incidental to procuring such transportation." I respectfully submit that although nothing may have been submitted to the Court to contradict the Byrne's affidavit, there was in fact sufficient evidence to indicate that his description was incomplete, and that in no sense were the plaintiffs' activities limited solely to acting as agents for shippers.

The Court, in its opinion, pointed out that the "incidence of regulation was intended to fall upon the carrier and those who act in connection with it in such a way as to make possible discrimination between shippers." It is precisely this possibility of discrimination, which arises from the plaintiffs' methods of operations, which makes the present investigation so vital and which was the occasion for the institution thereof.

In the affidavit previously submitted by me, I stated:

"I was informed, among other things, that it was a common practice among forwarders to sign a contract with a carrier, under

the terms of which the forwarder would be entitled to a lower rate if it undertook to utilize exclusively, for a certain period of time, the services of those carriers constituting the conference. The forwarder, on the other hand, would charge its customer, the shipper, the higher noncontract rate and thus would profit to the extent of the difference in rates."

The [redacted] were submitted to the Court on the argument of the motions, five volumes containing answers to questionnaires filed with the Commission by all of the respondents in the proceeding, 183 including the plaintiffs. One of the questions (Question 22) required information as to whether the forwarder signed contracts with steamship conferences or conference carriers entitling it to contract rates. Forty-five of the plaintiffs indicated that they entered into such contracts. Question 23 sought an answer as to whether, in each instance, when a contract rate was obtained, the forwarder gave the benefit of the contract rate to the shipper. Although most of the plaintiffs professed to charge the shipper exactly what it paid to the carrier, information before me points to the possibility that such may not be the case in each instance. Indeed, in the answers to the questionnaire itself, one of the plaintiffs, Dumont Shipping Co., Inc., indicated that on some commodities it charged contract rates and on others noncontract rates, referring to one client in Colombia. Another plaintiff, Universal Transcontinental Corporation, indicated that the benefit of the contract rates was passed on to the shipper only "generally, as a rule," and a third plaintiff, Van Oppen & Co., Inc., restricted its answer to giving the contract rate only in connection with shipments originating in this country or to shippers located in this country. This obvious opportunity for discrimination, arising out of the widespread use of contract rates, is one of the aspects of the industry which the Commission seeks to investigate.

This is not the only means whereby the shipper suffers possible discrimination, however. The brokerage fees paid by the various carriers furnish another method of effecting unequal treatment. The opinion states:

"Some large steamship companies maintain their own forwarding organizations \* \* \*. Such an organization may take the form of a corporation subsidiary to or otherwise affiliated with the carrier, or may be an independent forwarder to whom the carrier pays compensation as an inducement to ship by its line, 184 as in *Lehigh Valley R. Co. v. United States*, 243 U. S. 444.

Where the relationship between carrier and forwarder is of such a character, regulation of the forwarder is an appropriate and perhaps necessary means of preventing discrimination."

The questionnaire referred to sets forth three questions bearing on whether or not the forwarder is compensated by the carrier. Question 29 is as follows:

"Do you collect a commission or brokerage fee from the carrier with respect to shipments for which you have acted as forwarder?"

Every plaintiff in this proceeding answered that it collected a commission or brokerage fee from carriers. The next question was:

"30. Do you collect a commission or brokerage fee from the carrier in cases where you have made the shipments with your name as shipper on the bill of lading?"

Except in six instances, every plaintiff indicated that it collected commission or brokerage from the carrier, even under these circumstances. In answer to the inquiry (Question 31) as to whether the forwarder collects "a commission or brokerage fee from the carrier and forwarding fees from the shipper on the same shipment," every plaintiff stated that such payments were collected from both sources. For example, American Union Transport, Inc., replied that its service charges are based on the presumption that it received 1½% brokerage on ocean freight, and would be insufficient otherwise. Mohegan International Corporation stated that brokerage on the average shipment would not be sufficient to enable it to handle the shipment; and W. O. Smith & Company, Inc., indicated that the brokerage paid by the carrier was considered a commission for the placing of the business with the particular line. There is appended hereto, as Exhibit I, a schedule setting forth the answers made by each plaintiff to Questions 29, 30, and 31.

185 The receipt of brokerage by one engaged in the forwarding business tends to break down the effect of the Act since what actually is being accomplished is that through the means of brokerage the carrier pays for part of the services which the shipper would otherwise pay for itself. Where the brokerage is paid solely to an independent broker this effect is not apparent, but where the brokerage is paid to one who is also a shipper's agent it can easily be made into a device whereby the carrier does in part pay charges which perhaps should be borne by the shipper.

These brokerage fees and commissions form no mere incidental portion of the gross revenues of the forwarders. On the basis of information furnished to the Commission in the course of this investigation, it would appear that such commissions equal from 29% to 30% of the entire yearly income and, in some instances, account for a much greater proportion of receipts. Thus the forwarder, through the medium of monies supplied by the carrier is enabled to perform services for the shipper on a noncompensatory basis, to the prejudice of other shippers. In these circum-

stances, it is apparent that "regulation of the forwarder is an appropriate and perhaps necessary means of preventing discrimination," and that the relationship of the plaintiffs to the carriers is not merely that of consignor or shipper's agent, as is stated in the opinion.

If an interlocutory injunction against enforcement of the order of May 18, 1943, is granted, despite the facts pointed out above, the Commission, of course, will not be in a position to inquire into its own jurisdiction, even as limited by the opinion of this Court. It is submitted that the facts make it abundantly clear that the plaintiffs by their own answer have been shown to be within the category of persons who are subject to regulation by the Commission. It must be assumed that the Commission will not seek to exceed its jurisdiction in the event that some forwarders should prove not to be within the coverage of the Act, and accordingly no injunction should issue.

(Sgd) RALPH H. HALLETT.

Sworn to before me this 7th day of December 1943.

[SEAL]

JENNIE G. ABONSTEIN,

*Notary Public.*

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### Exhibit I

#### American Union Transport, Inc.

29. Yes.

30. Yes; in such instances we also act as brokers, the shipment being made by and handled for account of client.

31. Yes; our service charges are based on the presumption that we receive 1 1/4 % brokerage on ocean freight, and would be insufficient otherwise.

#### D. C. Andrews & Co., Inc.

29. Yes.

30. Yes; in view of the fact that we act as agents under the circumstances hereinbefore explained.

31. Yes.

#### Atlantic Forwarding Co., Inc.

29. Yes.

30. Yes.

31. Yes.

#### Baker, Irons & Dockstader, Inc.

29. Yes.

30. Yes.

31. The function of a freight broker and a forwarding agent is different, and if we act both as a freight broker and a forwarding agent on the same shipment, the answer to question 31 is yes.

## Baltic Shipping Co., Inc.

29. Yes.

30. Yes.

31. Yes.

## J. H. Bernard &amp; Co., Inc.

29. Yes; from some carriers, but not from all.

30. We do not make shipments in our name as principals.

31. Yes; in instances where the carrier pays a brokerage, and we are required to render services in addition to merely booking the space.

## Bluefries-New York, Inc.

29. Yes.

30. As agent: yes.

31. Yes.

## A. F. Cofod &amp; Co., Inc.

29. Yes.

30. Yes.

31. Yes.

## Colony Shipping Co., Inc.

29. In such ocean trades where brokerage is commonly paid by the carrier, we bill the carrier for brokerage at the prevailing rate.

30. Since as explained in answer to Question 19, we do not consider ourselves as principals when ladings are prepared in the name of the Colony Shipping Co., Inc., as agents, we collect a brokerage fee from the carrier when it is the practice to pay such brokerage in the trade.

31. Yes. When it is the practice in the trade for the carrier to pay brokerage.

## Thos. Cook &amp; Sons-Wagons Lits, Ing.

29. Yes.

30. Yes.

31. Yes.

## M. J. Corbett &amp; Co., Inc.

29. Yes.

30. Yes; but shipments are made in our name as agents only.

31. Yes.

## A. J. De May &amp; Co., Inc.

29. Yes.

30. Yes. However we only appear as shippers on the bill of lading as agents. We are not the actual shippers.

31. We obtain brokerage from the S. S. Co. and a fee from the shipper for the handling and documentation of the shipments.

189 R. F. Downing & Co., Inc.

29. Yes; the usual brokerage on freight when possible and it permits lower service charges in general to all clients.

30. Yes; although in such cases we certify as to the actual shippers, in which event we are agents.

31. Yes. The brokerage at 1 1/8% frequently amounts to a few cents or dollars. Our B/L service fee is only \$3.50.

Dumont Shipping Co., Inc.

29. Wherever the carrier pays a brokerage, we collect same.

30. Wherever the carrier pays a brokerage, we collect same.

31. Yes.

Dyson Shipping Co., Inc.

29. Yes; in many shipping trades but this does not apply to all lines or all countries, nor to any shipments from the West Coast.

30. Yes; provided the shipper confirms his request that we appear as shipper on the bill of lading in his behalf.

31. Yes.

John H. Faunce New York, Inc.

29. Yes.

30. Yes. But we only make the Bills of Lading in our name as agents.

31. Yes.

Freedman & Slater, Inc.

29. Yes.

30. Yes.

31. Yes.

The Gallie Corporation

29. Yes.

30. We do not make any shipments in our own name.

31. No.

190 P. A. Gaymar & Co., Inc.

29. Only carrier brokerages are those customarily paid by many steamship companies to forwarders.

30. Only when we appear as agent. We do not have any shipments for our own account.

31. Yes; when customarily paid by Sp. Co.

Gerhard & Hey, Co., Inc.

29. Yes.

30. Yes.

31. Yes.

Globe Shipping Co., Inc.

29. Yes; wherever the steamship company allows a commission.  
30. Yes.  
31. Yes.

H. A. Gogarty, Inc.

29. Yes.  
30. Yes; in view of the circumstances explained under question  
19, we believe we are entitled to the brokerage.  
31. Yes.

J. W. Hampton, Jr., & Co., Inc.

29. Yes.  
30. Yes.  
31. Yes.

W. Heimann International Transportation Service, Inc.

29. Yes.  
30. Yes.  
31. Yes.

E. Hennigson Company, Inc.

29. Yes.  
30. Yes.  
31. Yes.

191 Hensel, Bruckmann & Lorbacher, Inc.

29. Yes,  
30. Yes.  
31. Yes.

Hudson Shipping Co., Inc.

29. We do in all cases where such brokerage is paid by the ocean  
carriers.  
30. Same reply as on 29.  
31. Yes.

John H. Hunter & Son, Inc.

29. Yes; when such brokerage is properly payable by the  
carrier.  
30. Yes; when such brokerage is properly payable by the car-  
rier and when bills of lading are made in our name, it is stipulated  
that we are acting as agents.  
31. Yes; when such brokerage payment is properly payable by  
the carrier.

Inge & Company, Inc.

29. Yes; in trades where payable.

29. We do not ship in our own name but we have collected commission or brokerage fees where we have shipped in our name as agents.

31. Yes.

Inter-Maritime Forwarding Co., Inc.

29. Yes.

30. Yes.

31. Yes.

International Forwarding Company, Inc.

29. Yes.

30. Yes.

31. Yes.

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Karr-Ellis & Co., Inc.

29. Yes; when paid.

30. Shipments are not made in our name as principals. See our answer to question #19.

31. Yes.

Lansen-Haeve Corp.

29. Yes.

30. We collect brokerage from the carrier on shipments which we booked with the carrier, whether B/L issued in our name or name of exporter.

31. Yes.

Lunham & Reeve, Inc.

29. Yes.

30. Yes; when we appear as shipper, we do so only as agents and steamer bills of lading so read.

31. Yes.

Major Forwarding Company, Inc.

29. Yes; whenever possible.

30. Yes.

31. Yes.

Marks & Coyle, Inc.

29. Yes.

30. Yes; attaching letter from the shipper stating that we are acting only as freight forwarders in their behalf and specific request.

31. Yes; brokerage fee as allowed by the U. S. Maritime Commission to freight forwarders plus forwarding fees as agreed to by the shipper.

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Meadows Wye & Co., Inc.

29. Yes; we collect steamship brokerage.  
30. Yes; we collect steamship brokerage.  
31. Yes.

193 Mohegan International Corporation

29. We collect brokerage of usually 1 1/4% of freight from most of the steamship companies.  
30. Yes; but an affidavit is given to steamship company stating that we are acting as forwarding agents only for consignee, which is our position.  
31. Yes; brokerage on average shipment would not be sufficient to enable us to handle shipment.

The W. P. Neth Co., Inc.

29. Yes.  
30. No.  
31. Yes.

New Netherland Co., Inc.

29. Yes.  
30. Yes.  
31. Yes.

A. E. Nydegger & Co., Inc.

29. Yes.  
30. Yes.  
31. Yes.

Norton & Ellis of New York, Inc.

29. Yes.  
30. Yes. We ship in our own name as agents only.  
31. Yes.

Pitt & Scott Corporation

29. Yes.  
30. Yes; where our name appears "as agents" for the shipper.  
31. Yes.

Premier Shipping Company, Inc.

29. Yes.  
30. No.  
31. Yes.

194 Rohner, Gehrig & Co., Inc.

29. Yes; whenever possible.  
30. Yes.  
31. Yes.

H. W. St. John & Company

29. Yes; from those carriers who pay freight brokerage.  
30. Yes; as agents.  
31. Yes.

R. J. Saunders & Co., Inc.

29. Yes; usual  $1\frac{1}{4}\%$  of ocean freight.  
30. Yes.  
31. Yes.

W. O. Smith & Company, Inc.

29. Yes; where such brokerage is customary.  
30. Only when evidence is submitted to the carrier indicating the name of the actual shipper.  
31. Yes; but the brokerage paid by the carrier is considered a commission for our placing the business with the particular line.

Milton Snedeker Corporation

29. Yes; from those carriers who pay freight brokerage.  
30. Yes; from those carriers who pay freight brokerage.  
31. In cases where we arrange the booking of space and prepare and attend to the documentation, we bill the carrier for the freight brokerage and bill the shipper or consignee for the documentation service.

In cases where we only arrange the booking of space and the documentation is done by the shipper we only bill the carrier for freight brokerage.

United Shipping Corporation

29. Yes.  
30. No.  
31. Yes.

195 Universal Transcontinental Corporation

29. Yes.  
30. Yes.  
31. Yes.

Van Oppen & Co., Inc.

29. When allowed by the carrier under present regulations.  
30. Same as 29 above.  
31. Yes.

## Wedemann &amp; Godknecht, Inc.

29. Yes; whenever paid by steamship company.  
 30. Yes; see answer under 19a.  
 31. Yes. We collect if allowed a brokerage fee for booking cargo and a forwarding fee for documentation, handling and services.

## Daniel F. Young, Inc.

29. Yes.  
 30. No.  
 31. Yes,

## American Shipping Company, Inc.

29. Yes; when such freight brokerage is paid in the particular trade.  
 30. Yes; we have received brokerage on bills of lading in our own name, but such, as forwarding agents only.  
 31. Yes.

## Davies, Turner &amp; Co.

29. Certain steamship companies pay brokerage and in those cases we collect.  
 30. Yes; where steamship companies pay us.  
 31. Yes; whenever the carrier pays us brokerage fee.

## F. E. Wallace &amp; Co., Inc.

29. Yes/  
 30. Yes; but only as agents for others.  
 31. Yes.

## 196 Intercontinental Forwarding, Inc.

29. Yes; whenever paid by steamship company.  
 30. Yes. See answer under 19a.  
 31. Yes. We collect if allowed a brokerage fee for booking cargo and a forwarding fee for documentation, handling and services.

## Judson, Sheldon Corporation

29. Yes.  
 30. Yes.  
 31. Yes; with exception question 6.

## Cayanaugh Shipping Company

29. Yes.  
 30. Yes.  
 31. Yes.

Kersten Shipping Agency

29. Yes.

30. Yes (we always show "Kersten Shipping Agency as agents").

31. Yes.

Maron & Schaefer

29. Yes.

30. Yes; but with our bill for freight brokerage we attach a letter from our principals stating we are acting only as freight forwarders in their behalf.

31. Yes. Brokerage as allowed by Maritime Commission to freight forwarders plus forwarding fee as agreed with shippers.

H. Z. Bernstein Company

29. Yes.

30. Do not ship in our name.

31. Yes.

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Erriion Company

29. On those steamship lines who pay brokerage, we render a bill to cover brokerage fee on base rate paid.

30. No.

31. Collect brokerage fee from steamship lines, and also bill shippers with forwarding fee, in a good many cases brokerage fees are in small amounts, and does not compensate for services rendered.

L. Grodwohl & Son

29. Yes.

30. No.

31. Yes.

Ernest Tornabell

29. Yes; brokerage.

30. Yes; brokerage if the shipment is made for account of others.

31. Yes.

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[Title omitted.]

*Stipulation re judgment*

Filed Nov. 30, 1944

It is hereby stipulated and agreed by and between the attorneys for the parties hereto that the following shall constitute the evidence in this case and that final judgment shall be rendered on such evidence:

118 UNITED STATES VS. AMERICAN UNION TRANSPORT, INC., ET AL.

1. (a) Affidavit of Maurice A. Krisel, sworn to July 2, 1943, annexed to defendant's notice of motion dated July 2, 1943.
  - (b) Exhibits annexed to said notice of motion.
  - (c) Transcript of testimony in proceedings before United States Maritime Commission in the Matter of Port of New York Freight Forwarding Investigation—docket No. 621—pages 1 to 306, inclusive.
  - (d) Exhibits received in evidence in such proceeding in docket No. 621, consisting of five bound volumes of answers to questionnaire, being Exhibit 2 in such proceeding, and Exhibits 1 and 3 to 19, inclusive, in such proceeding.
2. (a) Affidavit of Herbert A. Byrne, sworn to July 14, 1943, annexed to plaintiffs' notice of motion dated July 14, 1943.
  - (b) Exhibits annexed to said notice of motion.

199 3. Extract from minutes of a meeting of the United States Maritime Commission held on August 21, 1942.

4. Memorandum dated August 17, 1942, from R. H. Hallett, Director, Division of Regulation to United States Maritime Commission.

5. (a) Affidavit of Harold L. Allen, sworn to September 3, 1943.
  - (b) Statement of Ralph H. Hallett annexed to said affidavit.
6. Affidavit of Ralph H. Hallett, sworn to September 18, 1943.
7. (a) Affidavit of Ralph H. Hallett, sworn to December 7, 1943, annexed to defendant's notice of motion dated December 9, 1943.
  - (b) Exhibit annexed to said notice of motion.

Dated New York, N. Y., October 23, 1944.

HAROLD L. ALLEN,

*Attorney for Plaintiffs.*

John F. X. McGahey,

*JOHN F. X. McGAHEY,*

*United States Attorney.*

*Attorney for Defendant.*

By Marvin M. Notkins,

*MARVIN M. NOTKINS,*

*Assistant United States Attorney.*

200 United States District Court, Southern District of New York.

Cix. 20/360

AMERICAN UNION TRANSPORT, INC., ET AL., PLAINTIFFS

UNITED STATES OF AMERICA, DEFENDANT

Suit by American Union Transport, Inc., and others to obtain

an injunction against enforcement of an order of the Maritime Commission.

Harold L. Allen, Attorney for plaintiffs.

John F. X. McGohey, United States Attorney, for defendant; Marvin M. Notkins, Assistant United States Attorney, of counsel.

Before SWAN, Circuit Judge, and CAFFEY and COXE, District Judges.

*Opinion*

Filed Nov. 30, 1944.

SWAN, C. J.

This case is now before us on final hearing. The evidence introduced is identical with that presented when the plaintiff's motion for interlocutory injunction and the defendant's motion for summary judgment were heard. At that time the court rendered an opinion which is reported in 55 F. Supp. 682. We see no reason to add anything to that opinion. Nor are our findings of fact on final hearing different in any material respect from those made when the motion for interlocutory injunction was under consideration. The plaintiffs are entitled to a permanent injunction against enforcement of the order of the Maritime Commission dated May 18, 1943.

Dated: November 29, 1944.

(S) THOMAS W. SWAN,  
*U. S. Circuit Judge.*  
(S) ALFRED C. COXE,  
*U. S. District Judge.*  
(S) FRANCIS G. CAFFEY,  
*U. S. District Judge.*

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In United States District Court

vs. AMERICAN UNION TRANSPORT, INC., ET AL.

v.

UNITED STATES

*Opinion*

Filed Nov. 30, 1943

SWAN, Circuit Judge.

The plaintiffs are corporations, partnerships and individuals engaged in business in the Port of New York as forwarders of freight in foreign commerce. Alleging that they are not persons subject to the Shipping Act of 1916 and the amendments thereof, 46 U. S. C. A. Chap. 23, §§ 801-842, they brought this suit against the United States pursuant to § 31 of the Shipping Act, 46

U. S. C. A. §§30, whereby the venue and procedure in suits to restrain enforcement of any order of the Maritime Commission are made the same as in similar suits respecting orders of the Interstate Commerce Commission. See 28 U. S. C. A. §§ 41 (28), 43-48. The complaint attacks two orders of the Maritime Commission made on August 21, 1942, and January 14, 1943, respectively.

The order of August 21, 1942, recites that each of the plaintiffs and others similarly engaged in "the business of forwarding in foreign commerce" is an "other person subject to this Act" within the meaning of that term as used in §§ 1 and 17 of the Shipping Act, 46 U. S. C. A. §§ 801, 816; that a specified corporation (not one of the plaintiffs) had engaged in practices which violated section 17 of the Act; and that the public interest requires a general inquiry to determine the extent of the existence of such practices among other forwarders in the Port of New York. It ordered that the Commission upon its own motion and without formal pleading "enter upon an investigation with a view toward making such order or orders or taking such other action in the premises as may be warranted by the record"; and that the plaintiffs and other forwarders named in an appendix to the order be made respondents in the proceeding. After the issuance of this order the Commission sent to all the respondents named therein a questionnaire which propounded, among other questions, the following: "Do you carry on the business of forwarding in connection with common carriers by water in foreign commerce?" All the plaintiffs answered this question in the affirmative, but allege in their complaint that this answer was erroneous. Thereafter on December 9 and 10, 1942, public hearings were held, and on the date last named the hearing was adjourned sine die to enable the Commission to obtain further information for a later resumption of the investigation. On January 14, 1943, the Commission on its own motion and purporting to exercise powers conferred by section 21 of the Act, 46 U. S. C. A. § 820, ordered the plaintiffs and others to answer within 30 days a questionnaire which required a lengthy report of business they had transacted in specified periods during 1940, 1941 and 1942, with break-downs of their receipts and disbursements. The plaintiffs thereupon brought the present suit.

A motion for an interlocutory injunction being made, a court of three judges was formed pursuant to 28 U. S. C. A. § 47. Thereafter the defendant filed its answer and moved for summary judgment in its favor upon the pleadings, exhibits, affidavits and evidence introduced at the Commission's hearings. Both motions were heard together on July 15, 1943. Decision was deferred at the request of the parties in order that they might later submit briefs, which they have done.

From the defendant's answer and exhibits attached thereto it appears that on May 18, 1943, the Commission vacated its order of January 14, 1943, and substituted therefor another order and questionnaire which required a similar but somewhat less burdensome report of business to be filed by the plaintiffs within 45 days from the date of the order. The plaintiffs have not formally amended their complaint to cover the May 18th order but both parties desire us to pass upon the validity of that order. Consequently we shall proceed upon the assumption that the complaint has been amended so that all allegations as to the order of January 14, 1943, except those referring to failure to submit the questionnaire to the Director of the Budget, now refer to the order of May 18th.<sup>1</sup>

In respect to the order of August 21st the plaintiffs must fail. This is not the kind of order which the District Court is given jurisdiction to annul under 28 U. S. C. A. §§ 41 (28), 46, 47. See United States v. Illinois Cent. R. Co., 244 U. S. 82, 89, 37 S. Ct. 584, 61 L. Ed. 1007; United States v. Los Angeles & S. L. R. Co., 273 U. S. 299, 309, 47 S. Ct. 413, 71 L. Ed. 651; Shannahan v. United States, 303 U. S. 596, 601, 58 S. Ct. 732, 82 L. Ed. 1039; Rochester Tel. Co. p. v. United States, 307 U. S. 425, 130, 59 S. Ct. 754, 83 L. Ed. 1147. The order of August 21st does not of itself adversely affect the plaintiffs; although it recites that they are subject to the Act, it does not constrain them to do or refrain from doing anything; their rights will be adversely affected only on the contingency of future administrative action. It is like an order of the Interstate Commerce Commission setting a case for hearing despite a challenge to its jurisdiction, as in the Illinois Central case, supra. Whether the Maritime Commission has jurisdiction to enter, on its own motion, upon a general investigation of the practices of freight forwarders is immaterial so far as the August 21st order is concerned. Even if jurisdiction were lacking, the order directing the investigation did not adversely affect the plaintiffs; nor does that part of the order which names them as respondents. They are under no constraint to appear at the investigation, if hearings shall be resumed.

The situation is different with respect to the May 18th order. This directs affirmative action on the part of the plaintiffs, and for failure to comply with the order the statute imposes a penalty at the rate of \$100 for each day of default. 46 U. S. C. A. §§ 249. The power of the Commission to make such order being in dispute, the need for injunctive relief is at least as great as it is with respect to orders of the type discussed by Mr. Justice Frankfurter as "Group (2)" in the Rochester Telephone opinion, 307 U. S. at

<sup>1</sup> The defendant's answer alleges that the Director of the Budget approved the form and contents of the questionnaire annexed to the order of May 18th. See sec. 5, 56 Stat. 1078, 50 U. S. C. A. Appendix, § 139c.

pages 132-134, 59 S. Ct. at pages 758, 759, 83 L. Ed. 1147. - If the Commission has exceeded its statutory powers, this court has jurisdiction to enjoin enforcement of the order. 46 U. S. C. A. §830; Skinner & Eddy Corp. v. United States, 249 U. S. 557, 562, 39 S. Ct. 375, 63 L. Ed. 772.

203 The order purports to be issued pursuant to §21, 46 U. S. C. A. §826, which authorizes the Commission to require "any common carrier by water, or other person subject to this chapter" to file "any periodical or special report" or "any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter." Unless the plaintiffs are persons "subject to" Chapter 23 of Title 46 the Commission lacks power to require them to file with it answers to the questionnaire annexed to the order of May 18th. Whether the chapter ~~does~~ subject them to its provisions turns upon the definitions contained in § 1, 46 U. S. C. A. § 801, and the nature of the plaintiffs' business. The section begins with a definition of the terms "common carrier by water in foreign commerce" and "common carrier by water in interstate commerce." It then defines "common carrier by water" as meaning either of such previously defined common carriers. Next follows the definition which has given rise to the present litigation: "The term 'other person subject to this Act' means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

There is no substantial dispute as to the plaintiffs' business activities. The complaint alleges that all of the plaintiffs are engaged in the business of shippers' agents and freight brokers in the Port of New York; they arrange, as agents for others, "for insurance, cartage, warehousing, and other services incidental to and including the affreightment of merchandise consigned to and from points within the United States, from and to points outside thereof"; they do not assume responsibility for delivery of the merchandise at destination. The affidavit of Herbert A. Byrne attached to the motion for an interlocutory injunction describes in greater detail how the business is done. There is nothing before us which contradicts in any essential respect his statements. He makes it clear that the "forwarder" acts solely as agent for the owner of goods in procuring their transportation by a common carrier by water and in performing services incidental to procuring such transportation. Usually the bill of lading is taken in the name of the owner of the goods; occasionally the forwarder may consolidate into one shipment goods of different owners, if the goods are similar in character and bound for the same port and the same consignee, and in the case of such a shipment the bill of lading

is given in the name of the forwarder. But in either case the forwarder's relationship to the owner is that of agent and his relationship to the carrier is that of shipper's agent or shipper. See Lehigh Valley R. Co. v. United States, 243 U. S. 444, 445, 37 S. Ct. 434, 61 L. Ed. 839.

The question for decision is whether the activities above outlined constitute carrying on the business of forwarding "in connection with a common carrier by water." If the forwarder's connection with the carrier need be nothing more than the making of contracts of affreightment, either in the name of the owner of the goods to be transported or in the forwarder's own name, then plainly the plaintiffs are persons subject to the Act. But in our opinion the statutory clause under consideration contemplated a relationship between forwarder and carrier closer than that resulting merely from a contract of affreightment. The Shipping Act was a comprehensive measure intended to subject common carriers by water to substantially the same type of regulation as the Interstate Commerce Act, 49 U. S. C. A. § 1 et seq., imposed on interstate common carriers by land. See United States Nav. Co. v. Cunard S. S. Co., 284 U. S. 474, 480, 52 S. Ct. 247, 76 L. Ed. 408. The incidence of regulation was intended to fall upon the carrier and those who act in connection with it in such a manner as to make possible discrimination between shippers. Some large steamship companies maintain their own forwarding organizations. See House Report No. 1682, 77th Congress, 2d Session. Such an organization may take the form of a corporation subsidiary to or otherwise affiliated with the carrier, or may be an independent forwarder to whom the carrier pays compensation as an inducement to ship by its line, as in Lehigh Valley R. Co. v. United States, 243 U. S. 444, 37 S. Ct. 434, 61 L. Ed. 839. Where the relationship between carrier and forwarder is of such a character, regulation of the forwarder is an appropriate and perhaps necessary means of preventing discrimination. But where the relationship of the forwarder to the carrier is only that of consignor or shipper's agent regulation of the forwarder is not necessary, since the provisions forbidding the carrier to discriminate between shippers will suffice. Similar considerations apply with respect to those who furnish wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. Such facilities are customarily furnished under some form of continuing contractual or other relationship with the common carrier by water which may result in discrimination against or unfair advantage to shippers, if those who furnish the facilities are not regulated. Such was the case in State of California v. United States, D. C. Cal., 46 F. Supp. 474, now pending in the Supreme

Court, 63 S. Ct. 980,<sup>2</sup> the only authority brought to our attention which has construed the phrase in question. We do not believe that the Shipping Act was intended to extend to the regulation of the rates and practices of independent forwarders or furnishers of terminal facilities, who perform services solely for the shipper and at his expense and whose dealings with the carrier are limited to contracting for transportation at the carrier's established rates. Compare Lehigh Valley R. Co. v. United States, 243 U. S. 444, 37 S. Ct. 434, 61 L. Ed. 839, where forwarding services of the same character as those rendered by the present plaintiffs were held not to be "connected with such transportation" within the meaning of that phrase as used in section 15 (13) of the Interstate Commerce Act, 49 U. S. C. A. § 15 (13). The construction of the Shipping Act for which the defendant contends would expand the regulation beyond anything heretofore asserted. Even the recent Act, 56 Stat. 284, 49 U. S. C. A. § 1001 et seq., bringing domestic freight forwarders within the jurisdiction of the Interstate Commerce Commission excludes by definition forwarders who assume no responsibility for the transportation of the merchandise.

For the foregoing reasons the complaint in so far as it seeks an injunction against the order of August 21st is dismissed; an interlocutory injunction against enforcement of the order of May 18, 1943, is granted; and the defendant's motion for summary judgment is denied. Either party may submit proposed findings of fact on five days' notice to the other.

In United States District Court

*Opinion*

Filed March 8, 1944

ON MOTION FOR REARGUMENT

This motion asks a modification of our opinion of November 30, 1943 in so far as it denied the defendant a summary judgment and granted the plaintiffs an interlocutory injunction against enforcement of the Commission's order of May 18, 1943. Argument of the motion was heard on December 16, 1943 and the matter was taken under advisement with leave to the attorneys to file briefs. A brief has been filed on behalf of the plaintiffs. On February 19, 1943 counsel for the defendant advised the court that he did not desire to file a brief on behalf of the defendant.

Our former decision in this case was rested upon the ground that the plaintiffs were not shown to be carrying on the business of forwarding "in connection with a common carrier by water." The opinion stated that there was nothing before the court to

<sup>2</sup> Affirmed 320 U. S. 577, 94 F. 2d 352.

contradict in any essential respect the Byrne affidavit which made clear that a forwarder "acts solely as agent for the owner of goods in procuring their transportation by a common carrier by water and in performing services incidental to procuring such transportation." Mr. Hallett's affidavit in support of the motion for re-argument asserts that we overlooked certain evidence, not called to our attention upon the original argument or in the briefs then filed, which shows that the plaintiffs' activities are not limited solely to acting as agents for shippers. This evidence is to be found in five volumes containing answers to questionnaires filed with the Commission by numerous forwarders, including the plaintiffs, and submitted to the court on the argument of the original motions. It relates to two matters: (1) "contract rates" and (2) brokerage.

(1) Contract rates. Question 22 of the questionnaire requires information as to whether the forwarder who answered the question signed contracts with steamship conferences or conference carriers entitling him to contract rates. Mr. Hallett's affidavit states that 45 of the plaintiffs (without specifying which plaintiffs) made answers indicating that they did enter into such contracts. By their answer to question 23, most of the plaintiffs, Mr. Hallett says, professed to give the shipper the benefit of the contract rate but he names three plaintiffs who did not always do so. We find no copy of a contract for "contract rates" in the record. The terms of such contracts and their implications have not been submitted to us; they can be developed upon final hearing. Without knowing more we cannot say from the mere fact that some of the plaintiffs entered into contracts for contract rates, that they were conducting their forwarding business "in connection with a common carrier" in such sense as to justify a summary judgment for the defendant. Nor is it clear to us what bearing on this question the ultimate enjoyment of contract rates, by the shipper or by the forwarded, might have. That too may be elucidated on a full hearing of the cause.

(2) Brokerage. From the answers to questions 29, 30, and 31 of the questionnaire it appears that every plaintiff receives a commission or brokerage fee from the carrier with respect to shipments for which he acts as forwarder; all but six do this in cases where they make the shipments in their own names as shipper on the bill of lading; and every plaintiff collects forwarding fees from the shipper on the same shipment on which it collects brokerage from the carrier. Some of the plaintiffs say that their forwarding fees are based on the assumption that they will collect 1½% brokerage on ocean freight. Hence the defendant argues that receipt of brokerage from the carrier, where broker and forwarder are one, shows that each plaintiff carries on the business of forwarding in connection with a common carrier by water and is therefore within the statutory definition of 46 U. S. C. A. § 801.

The plaintiffs answer that payment of brokerage is provided for in the carriers' tariffs, and that the legality of the practice has been recognized by the Commission in Gulf Brokerage and Forwarding Agreements, 1 U. S. M. C. 533. This was a proceeding concerning 92 agreements filed for approval under § 15 of the Shipping Act, 46 U. S. C. A. § 814, by common carriers by water in foreign commerce and other persons termed brokers. The agreements purported to fix the amounts of commissions the carriers would pay such other persons for brokerage services, and also the amounts of the charges to be collected from shippers for forwarding services to be performed by the carriers and such other persons. An order was entered denying approval of the proposed agreements and discontinuing the proceeding without prejudice to the filing of new agreements as indicated in the opinion.

206 The opinion states: "Brokers are not subject to the Shipping Act of 1916 and consequently agreements between carriers subject to that Act and brokers are not of the character required to be filed under § 15 thereof."

The mere receipt of brokerage from a carrier by one who is also a forwarder connotes no contract between the payor and payee other than that which arises out of the contract of affreightment. There is no implication that the forwarder agrees with the carrier to refuse to handle shipments as to which the shipper has specified routing by a competing carrier (which as the Commission noted in the opinion just discussed, it would not approve). We do not think the receipt of brokerage pursuant to a carrier's filed tariff proves that the forwarder who receives it carries on the business of forwarding "in connection with the carrier."

The evidence called to our attention by the motion for reargument does not justify the granting of a summary judgment for the defendant. Consequently we adhere to our former opinion and for the reasons therein stated think that an interlocutory injunction should be granted the plaintiffs.

207 In United States District Court, Southern District of New York

Civ. 20-360

AMERICAN UNION TRANSPORT, INC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

*Findings of fact and conclusions of law*

Filed Nov. 30, 1944

This cause having come on for trial before the undersigned on the 9th day of November 1944, and the proofs of both parties having

been adduced; and the plaintiffs having appeared by Harold L. Allen, Esq., and the defendant having appeared by John F. X. McGolhey, United States Attorney for the Southern District of New York (Marvin M. Notkins, Assistant United States Attorney, of counsel), the Court now makes the following findings of fact and conclusions of law.

*Findings of fact*

1. The plaintiffs are corporations, copartnerships and individuals engaged in business in the Port of New York, Southern District of New York, as forwarders of freight "in foreign commerce."
2. The plaintiffs brought this action against the United States pursuant to Title 46, U. S. Code, Section 830 to set aside orders hereafter described of the United States Maritime Commission.
3. One of the orders of said Maritime Commission which the plaintiffs sought to set aside was issued on August 21, 1942, in a proceeding entitled "Port of New York Freight Forwarders Investigation, Docket No. 621." Said order recited that each of the plaintiffs and a large number of other persons, who are not parties to this action, were engaged in the business of forwarding in foreign commerce; that each of them is an "other person subject to" the Shipping Act of 1916 as amended; that the public interest requires a general inquiry to determine the extent of the existence of certain practices and the lawfulness thereof under said Act; and it ordered that said Maritime Commission upon its own motion and without formal pleadings "enter upon an investigation with a view toward making such order or orders or taking such other action in the premises as may be warranted by the record."
4. Said order of August 21, 1942, does not of itself adversely affect plaintiffs; it does not constrain them to do or refrain from doing anything, and accordingly by an order of this Court dated June 12, 1944, the complaint was dismissed in so far as it sought an injunction against said order of the Maritime Commission dated August 21, 1942.
5. On January 14, 1943, said Maritime Commission issued an order which directed the plaintiffs to answer within thirty days a questionnaire thereto annexed which required a lengthy report of business transacted during specified periods in 1940, 1941 and 1942, with breakdowns of their receipts and disbursements. The time for furnishing the required information was extended to April 15, 1943, and again to June 1, 1943. Said order of January 14, 1943, bore no approval of the Director of the Bureau of the Budget prior to its issuance and service upon the plaintiffs. The plaintiffs prayed for an injunction against the enforcement of said order.

but on May 18, 1943, said Maritime Commission vacated its order of January 14, 1943.

6. On May 18, 1943, said Maritime Commission made a new order which directed the plaintiffs to answer within forty-five days,

under penalty of forfeiting one hundred dollars for each day of default, as provided in 46 U. S. Code. Section 820, a questionnaire thereto annexed which required a lengthy report of plaintiffs' business and directed them to file with said Maritime Commission a true and accurate report of 105 individual forwarding transactions, 35 of which were billed consecutively to their customers commencing January 1, 1940, 35 of which were billed consecutively to their customers commencing June 1, 1941, and 35 billed consecutively to their customers commencing June 1, 1942. Said order of May 18, 1943, bears the approval of the Director of the Bureau of the Budget.

7. The plaintiffs have not formally amended their complaint to cover the order of May 18, 1943, but a copy of said order is annexed to the answer of the defendant and by the consent of both parties the question of the validity of said order has been submitted to this Court. All allegations in the complaint with respect to the order of January 14, 1943 except those referring to the failure to submit the questionnaire to the Director of the Bureau of the Budget are deemed to refer to the order of May 18, 1943.

8. All of the plaintiffs are engaged in the business of shippers' agents and freight brokers; they arrange as agents for others for insurance, cartage, warehousing and other services incidental to and including the affreightment of merchandise consigned to and from points within the United States from and to points outside thereof. They do not assume responsibility for the delivery of the merchandise at destination.

9. The plaintiffs usually take the bill of lading in the name of the owner of the goods. Occasionally the bill of lading is taken in the name of the plaintiff forwarder, if the goods being shipped are similar in character and bound for the same port and the same consignee. As forwarders, the plaintiffs perform services solely for the shipper at his expense.

210 10. The plaintiffs also act as freight brokers. When a plaintiff as forwarder also acts as freight broker, he receives a brokerage commission or fee from the carrier with respect to the shipment for which he acts as forwarder and collects a forwarding fee from the shipper.

11. The plaintiffs have no continuing contractual or other relationship with the common carriers by water over whose lines they ship merchandise.

12. After the issuance of its order of August 21, 1942 said Maritime Commission sent to the plaintiffs a questionnaire which contained the question: "Do you carry on the business of forwarding in connection with common carriers by water in foreign commerce?" All the plaintiffs answered this question in the affirmative. In their complaint in this action the plaintiffs allege that their answer to the aforesaid question was erroneous. The evidence before this Court contradicts the admission made by said affirmative answer. The plaintiffs do not carry on the business of forwarding in connection with common carriers by water within the meaning of the Shipping Act of 1916 as amended.

*Conclusions of law*

1. This Court was duly convened pursuant to 28 U. S. C. § 47 and has jurisdiction pursuant to Section 31 of the Shipping Act of 1916 as amended, 46 U. S. C. § 830.
2. The plaintiffs are not "other persons subject to" the Shipping Act of 1916 as amended.
3. The Maritime Commission lacks jurisdiction to direct the plaintiffs to answer the questionnaire annexed to its order of May 18, 1943.
211. 4. The plaintiffs are entitled to a permanent injunction against the enforcement of said order of May 18, 1943.

THOMAS W. SWAN,

U. S. C. J.

ALFRED C. COXE,

U. S. D. J.

FRANCES G. CAFFEY,

U. S. D. J.

Dated New York, N. Y., November 29 1944.

212 In United States District Court, Southern District of  
New York

Civ. 20-360

AMERICAN UNION TRANSPORT, INC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

*Judgment*

Nov. 30, 1944

The issues in the above entitled action having duly come on for trial on the 9th day of November 1944 before Honorable Thomas

W. Swan, United States Circuit Judge, and Honorable Francis G. Caffey, and Honorable Alfred C. Coxe, United States District Judges, constituting a court duly convened under the provisions of 28 U.S.C. § 47, and the plaintiffs having appeared by Harold L. Allen, Esq., and the defendant having appeared by John F. X. McGahey, United States Attorney for the Southern District of New York (Marvin M. Notkins, Assistant United States Attorney, of counsel) and the proof of both parties having been adduced, and on the 29th day of November 1944 the Court having made its findings of fact and conclusions of law, it is

Ordered, adjudged, and decreed that the order of the United States Maritime Commission dated May 18, 1943, in a certain proceeding entitled "Port of New York Freight Forwarder Investigation, No. 621" be and the same hereby is set aside, suspended and annulled, and the defendant, its agents, servants, and attorneys be and the same hereby are permanently enjoined and restrained from in any manner enforcing or instituting any proceeding 213 for the enforcement of said order of the United States Maritime Commission dated May 18, 1943.

Dated New York, N. Y., November 29, 1944.

Approved:

(S) THOMAS W. SWAN,  
U. S. C. J.  
(S) ALFRED C. COXE,  
U. S. D. J.  
(S) FRANCIS G. CAFFEY,  
U. S. D. J.

Judgment rendered:

(Sgd.) GEORGE J. H. FOLLMER.

Clerk.

NOVEMBER 30, 1944.

214

In United States District Court

[Title omitted.]

*Petition for allowance of appeal.*

The United States of America, petitioner herein, feeling itself aggrieved by the final decree of the United States District Court for the Southern District of New York entered by said court in the above-entitled cause on November 30, 1944, prays an appeal from said decree to the Supreme Court of the United States, and that a transcript of the Record in this cause, duly authenticated, may be sent to the Supreme Court of the United States. The particulars wherein the defendant considers the decree of this Court

erroneous are set forth in the assignment of errors accompanying this petition, to which reference is made.

Petitioner submits and presents to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause.

THE UNITED STATES OF AMERICA,  
By (Sgd.) CHARLES FAHY,  
Charles Fahy,  
*Solicitor General.*  
(Sgd.) JOHN F. X. McGOHEY,  
John F. X. McGohay,  
*United States Attorney.*

JANUARY 26, 1945.

215

In United States District Court

[Title omitted.]

*Assignment of errors*

Comes now the defendant the United States of America in the above entitled cause and files the following assignment of errors upon which it will rely in the prosecution of the appeal to the Supreme Court of the United States herewith petitioned for in said cause from the decree of the District Court of the United States for the Southern District of New York entered November 30, 1944.

The Court erred:

1. In making and entering its final decree setting aside, suspending and annulling the order of the United States Maritime Commission dated May 18, 1943, and permanently enjoining the defendant, its agents, servants and attorneys from in any manner enforcing or instituting any proceeding for the enforcement of said order.
2. In failing to grant summary judgment to the defendant or to dismiss the complaint as being without equity.
3. In concluding that plaintiffs are entitled to a permanent injunction against the enforcement of the said order of the United States Maritime Commission of May 18, 1943.
4. In finding and concluding that plaintiffs and each of them is not an "other person" as defined in the Shipping Act of 1916, as amended.
- 216 5. In failing to hold that each of the plaintiffs is an "other person" within the meaning of said Act and is subject to the jurisdiction of the United States Maritime Commission and to Commission orders issued pursuant to Section 21 of said Act.

6. In finding and concluding that plaintiffs do not carry on the business of forwarding in connection with common carriers by water within the meaning of Section 1 of the Shipping Act of 1916, as amended.

7. In holding that only persons carrying on the business of forwarding who are "a corporation subsidiary to or otherwise affiliated with" a common carrier by water, or "to whom the carrier pays compensation as an inducement to ship by its line" are subject to the jurisdiction of the Maritime Commission and to Commission orders issued pursuant to Section 21 of the Shipping Act.

8. In finding that plaintiffs have no continuing contractual or other relationship with common carriers by water over whose lines they ship merchandise.

9. In finding that the evidence contradicted admissions previously made by plaintiffs that they do carry on the business of freight forwarding in connection with common carriers by water in foreign commerce.

10. In failing to dismiss the complaint on the ground that the order of May 18, 1943, was not reviewable by injunction proceedings.

THE UNITED STATES OF AMERICA,

Charles Fahy,

CHARLES FAHY,

*Solicitor General.*

By (Sgd.)

John F. X. McGohey,

(Sgd.) JOHN F. X. MCGOHEY,

*United States Attorney.*

217

In United States District Court

[Title omitted.]

*Order allowing appeal*

Jan. 27, 1945

In the above entitled cause, the defendant having made and filed its petition praying the allowance of an appeal to the Supreme Court of the United States from the final decree entered in the above entitled cause by the District Court of the United States for the Southern District of New York on November 30, 1944, and having also made and filed an assignment of errors and a statement of jurisdiction, and having in these respects conformed to the statutes of the United States and the Rules of Court in such cases made and provided;

It is ordered and decreed, That an appeal be, and the same is hereby, allowed as prayed for.

And it is further ordered, That the Clerk of Court transmit to the United States Supreme Court, as part of the Record herein, the original papers, in lieu of copies thereof, as may be designated by appellant's and appellees' praecipe for transcript of the Record filed pursuant to Rule 10 of the Revised Rules of the Supreme Court of the United States.

Dated January 27, 1945.

(Sgd.) THOMAS W. SWAN,  
*United States Circuit Judge.*

218 In the District Court of the United States  
For the Southern District of New York

Civil Action No. 20-360

AMERICAN UNION TRANSPORT INC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

*Notice of Appeal*

To The Attorney General for the State of New York.

You are hereby notified that the District Court of the United States for the Southern District of New York on January 26, 1945, filed and entered an order allowing an appeal by the United States to the Supreme Court of the United States from a decree filed and entered on November 30, 1944, in the above-entitled cause, and that the citation signed by said Court on January 26, 1945, in connection with the order allowing such appeal, is made returnable within forty (40) days from the date of the signing of such citation.

Attached hereto are copies of each of the following documents: the citation referred to above, the petition for and order allowing said appeal, the assignment of errors, the defendant's jurisdictional statement pursuant to Rule 12 of the Revised Rules of the Supreme Court of the United States, and the statement required to be served upon appellees by said Rule 12.

This notice is given to you pursuant to the provisions of United States Code; Title 28, Section 47 (a) enacted March 3, 1911 c. 231, sec. 210.

Dated Jan. 26, 1945.

CHARLES FAHY

Charles Fahy

*Solicitor General.*

JOHN F. X. McGOWHEY

John F. X. McGowhey

*United States Attorney.*

Receipt of a copy of the within notice and of a copy of each of the papers mentioned therein hereby is acknowledged this 5th day of February, 1945.

NATHANIEL L. GOLDSTEIN,  
Attorney General, State of New York.

219 In United States District Court

[Title omitted.]

*Précipe for transcript of record*

*To the Clerk of the above-named Court:*

You will please prepare a transcript of the record in the above-entitled cause to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Petition and exhibits annexed thereto.
2. Answer of the United States of America and exhibits annexed thereto.
3. Defendant's Notice of Motion dated July 2, 1943, with annexed affidavit of Maurice A. Krisel and exhibits annexed thereto.
4. Plaintiffs' Notice of Motion dated July 14, 1943, with annexed affidavit of Herbert A. Byrne and exhibits annexed thereto.
5. (a) Transcript of testimony in proceedings before United States Maritime Commission in the Matter of Port of New York Freight Forwarding Investigation, docket No. 261, pages 1 to 306, inclusive.  
 (b) Exhibits received in evidence in such proceeding in docket No. 621, consisting of five bound volumes of answers to questionnaire, being Exhibit 2 in such proceeding, and Exhibits 1 and 3 to 19, inclusive, in such proceedings.
6. Extract from minutes of a meeting of the United States Maritime Commission held on August 21, 1942.
220. 7. Memorandum dated August 17, 1942 from R. H. Hallett, Director, Division of Regulation, United States Maritime Commission.
8. (a) Affidavit of Harold L. Allen, sworn to September 3, 1943.  
 (b) Statement of Ralph H. Hallett annexed to said affidavit.
9. Affidavit of Ralph H. Hallett, sworn to September 18, 1943.
10. Defendant's Notice of Motion dated December 9, 1943, with annexed affidavit of Ralph H. Hallett and exhibit annexed thereto.
11. Stipulation dated October 23, 1944, between the parties as to what shall constitute the evidence in this case upon which final judgment might be rendered.
12. Opinions of the Court dated November 30, 1943; March 7, 1944 (on rehearing); and November 29, 1944 (on final hearing).

13. Findings of fact and conclusions of law of the Court, December 29, 1944.
14. Judgment of the Court, November 30, 1944.
15. Petition for allowance of appeal.
16. Assignment of errors.
17. Statement as to jurisdiction.
18. Order allowing appeal.
19. Citation on appeal.
20. Statement directing attention to the provisions of Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, and proof of service.
21. Notice to the Attorney General of the State of New York.
22. This precedes:

CHARLES FAHY,  
Charles Fahy,  
*Solicitor General.*  
JOHN F. X. McGOHEY,  
*United States Attorney.*

221 [Citation in usual form showing service on Harold L. Allen, filed Jan. 27, 1945, omitted in printing.]

222 [Clerk's certificate to transcript omitted in printing.]

223 In United States District Court

*Stipulation*

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that plaintiffs' petition herein be deemed amended by including as an exhibit the annexed questionnaire which is the document referred to as marked "C" in Paragraph VI of the said petition; and it is further

Stipulated that the exhibit to the said petition, marked "C" be deemed to be annexed to and part of Exhibit "B."

Dated New York, April 1, 1943.

HAROLD L. ALLEN,  
*Attorney for Plaintiffs.*  
MATHIAS F. WEREK,  
*Attorney for Defendant.*

## 226 UNITED STATES MARITIME COMMISSION

WASHINGTON

Docket No. 621

## PORT OF NEW YORK FREIGHT FORWARDERS INVESTIGATION

*Questionnaire*

You are requested to furnish within fifteen (15) days from date hereof, specific and complete answer to each of the following questions. (If additional space is required, complete answer on additional sheets and attach them to questionnaire.)

1. Name of respondent.

2. Do you carry on the business of forwarding in connection with common carriers by water in foreign commerce?

3. Itemize in detail the services you perform as a forwarder, with particular reference to the receiving, handling, storing, or delivery of cargo forwarded.

4. Do you make a separate charge for each of the services rendered by you?

5. If your answer to No. 4 is "no," explain your method of assessing charges and the basis for the various charges.

6. Are your charges the same to all shippers receiving similar services? If not, explain why distinction is made as between shippers.

7. How do you account to your clients for expenses incurred by you on their behalf, such as inland and ocean freight charges, landing charges, cables, etc.?

8. Do you always show on your bill for services, the actual ocean freight rate or rates assessed by the carrier?

9. Do you require payment for your services in advance of or subsequent to rendering service?

10. Do you advance the money for any expenses necessary in my particular transaction?

11. If your answer to No. 10 is "yes," do you lump it in with your charge or do you account to the shipper and get reimbursement?

12. If your answer to No. 10 is "no," do you require the shipper to advance those expenses and do you itemize them?

13. In case the shipper advances the expenses, do you account to the shipper for actual expenditures?

14. Do you do any buying for shippers, and, if so, do you receive a commission therefor?

15. Do any of your clients maintain a revolving fund for your use in the forwarding of their shipments?

7-16. Do you have an established form of contract or contracts which you enter into with shippers or consignees? If so, attach copy of all forms used?

17. If you do not have an established form of contract, or if contracts are oral, explain in full how the arrangements are made for your services?

18. Do you issue a bill of lading to a shipper or consignee for whom you are acting as forwarder? If so, attach copy.

19. Do you take out ocean carriers' bills of lading in your own name?

(b) In the name of your client?

If you use the former method, explain the reasons and circumstances.

228 20. In case of loss of or damage to shipment, who immediately compensates the owner, you or the carrier?

21. Do you post a surety bond to guarantee payment of claims or judgments against you? If so, in what amount and with whom?

22. Do you sign contracts with steamship conferences or conference carriers entitling you to contract rates?

23. If you ship under your own name at contract rates, do you always charge your client such contract rate? If not, do you charge your client the non-contract rate?

24. Do you publish and circulate any tariff, rate sheet or circular setting forth your charge for forwarding services? If so, attach copy.

25. Do you give notice of rate charges, and, if so, how much?

26. Do you strictly adhere to your published tariffs?

27. If you do not publish a tariff, etc., explain how you inform your clients of the charges?

28. Do you perform any services as a broker which are not included in forwarding? If so, explain the nature of such services.

29. Do you collect a commission or brokerage fee from the carrier with respect to shipments for which you have acted as forwarder?

30. Do you collect a commission or brokerage fee from the carrier in cases where you have made the shipments with your name as shipper on the bill of lading?

31. Do you collect a commission or brokerage fee from the carrier and forwarding fees from the shipper on the same shipment?

32. Do you assess a forwarding fee on all shipments as to which you have performed forwarding services? If not, state 229 reasons and circumstances.

33. Is your company owned or controlled by or affiliated with any shippers for whom you act as forwarder or with any common carrier? If so, explain.

34. Do you remit to the shipper any part of the commission or brokerage fees received from the carrier?

35. Do you maintain and operate a warehouse for storing, concentration or distribution of property which you handle as a forwarder?

(Signed) -----

(Respondent).

By -----

(Name and title of official)

Subscribed and sworn to before me this — day of — 1942.

-----  
(Notary Public)

230 [Clerk's certificate to foregoing paper omitted in printing.]

231 In the Supreme Court of the United States

*Statement of points relied upon and designation of record for printing*

Filed March 23, 1945

Pursuant to Rule 13, paragraph 9 of this Court, the appellant states that it intends to rely on all of the points in its assignment of errors except point numbered 10 upon which appellant does not intend to rely.

The appellant deems the entire record as designated in its praecipe for transcript of record heretofore filed in the District Court of the United States for the Southern District of New York necessary for the consideration of the points relied upon, with the following exceptions:

A. The documents designated and described in paragraphs 5 (b), 8 (a), and 8 (i) in their entirety.

B. The transcript of testimony in proceedings before the United States Maritime Commission as designated and described in paragraph 5 (a) of the aforesaid praecipe except that appellant does rely upon the testimony of Harold C. Dow, appearing at pages 25 through 33 of said transcript.

THE UNITED STATES OF AMERICA,  
By CHARLES FAHY,  
Charles Fahy,

Solicitor General.

232 CITY OF WASHINGTON,

*District of Columbia, ss.*

Mary Agnes Quinn, being duly sworn, deposes and says that there has this day been transmitted by registered letter to Harold L. Allen, attorney of record for the appellees in the above entitled

cause, copies of appellant's Statement of Points Relied Upon and Designation of Record for Printing, this day duly filed with the Clerk of this Court.

MARY AGNES QUINN.

Subscribed and sworn to before me this 23d day of March 1945.

[SEAL]

NELLIE E. BISHOP.

[File endorsement omitted.]

*Notary Public.*

23 In the Supreme Court of the United States

*Appellees' counterdesignation of record for printing.*

Filed March 31, 1945.

Pursuant to Rule 13, paragraph 9 of this Court, the appellees hereby designate the following additional parts of the record which they deem material herein, to wit:

A. The documents designated and described in paragraphs 8 (a) and 8 (b) of the praecipe for transcript of record heretofore filed in the District Court of the United States, for the Southern District of New York.

Dated New York City, N. Y., March 30, 1945.

AMERICAN UNION TRANSPORT CO., INC.,

D. C. ANDREWS & CO., INC.,

ATLANTIC FORWARDING CO., INC., ET AL.,

By HAROLD L. ALLEN,

*Attorney for Appellees.*

[File endorsement omitted.]

31 Supreme Court of the United States

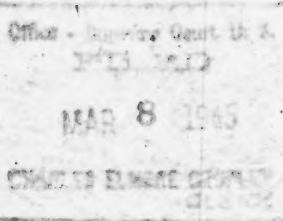
*Order noting probable jurisdiction*

April 2, 1945.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsement on cover: File No. 49479. D. C. U. S., Southern New York. Term No. 1026. The United States of America, Appellant vs. American Union Transport, Inc., D. C. Andrews & Co., Inc., Atlantic Forwarding Co., Inc., et al. Filed March 8, 1945. Term No. 1026 O. T. 1944.

FILE COPY



No. 1026 44

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In the Supreme Court of the United States

OCTOBER TERM, 1944

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THE UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN UNION TRANSPORT, INC., D. C. ANDREWS  
& CO., INC., ATLANTIC FORWARDING CO., INC.,  
ET. AL.

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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STATEMENT AS TO JURISDICTION

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3

**In the District Court of the United States  
for the Southern District of New York**

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Civil Action No. 20-360

**AMERICAN UNION TRANSPORT, INC., ET AL.,  
PLAINTIFFS**

v.

**UNITED STATES OF AMERICA, DEFENDANT**

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**STATEMENT AS TO JURISDICTION**

In compliance with Rule 12 of the Supreme Court of the United States, the United States of America herewith submits its statement showing the basis of the jurisdiction of the Supreme Court to review on appeal the final decree rendered by the above-entitled court in the above-entitled proceeding.

The date of the final decree of the District Court of the United States for the Southern District of New York is November 30, 1944. The petition for appeal is dated January 26, 1945.

**STATUTORY PROVISIONS SUSTAINING JURISDICTION**

The statutory jurisdiction of the Supreme Court to review by direct appeal the decree complained of is conferred by Section 31 of the Shipping Act of 1916 (39 Stat. 738; 46 U. S. C. 830),

the Urgent Deficiencies Act of 1913 (38 Stat. 220; 28 U. S. C. 47, 47 (a)), and Section 238 of the Judicial Code (43 Stat. 938; 28 U. S. C. 345). The provisions in question read as follows:

1. Shipping Act, 1916, Section 31:

The venue and procedure in the courts of the United States in suits brought to enforce, suspend or set aside in whole or in part, any order of the board, except as otherwise provided for, shall be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district courts having jurisdiction over the parties.

2. Title 28, United States Code, Section 47:

\* \* \* An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (October 22, 1913, c. 32, 38 Stat. 220.)

3. Title 28, United States Code, Section 47 (a):

A final judgment or decree of the district court in the cases specified in section

44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the state. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title \* \* \*. (March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; October 22, 1913, c. 32, 38 Stat. 220.)

#### 4. Judicial Code, Section 238:

A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

\* \* \* \* \*

(4) So much of "An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes," approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in

suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

The following cases are believed to sustain the jurisdiction of the Supreme Court: *California v. United States*, 320 U. S. 577; *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297.

#### **STATUTE OF THE UNITED STATES INVOLVED**

The validity of a statute of a state, or statute or treaty of the United States is not involved. The decree complained or construed adversely to the contentions of the defendant, the United States of America, certain provisions of the Shipping Act of 1916 (39 Stat. 738; 46 U. S. C. 801, et seq.), particularly Sections 1 and 21 of said act which are, in pertinent part, as follows:

##### **Section 1 (46 U. S. C. 801):**

**When used in this Act:**

The term "common carrier, by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: **Provided**, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water

of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this Act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

\* \* \* \* \*

**Section 21 (46 U. S. C. 820):**

The commission may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or

charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the commission. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of \$100 for each day of such default.

\* \* \* \* \*

#### THE NATURE OF THE CASE

The United States Maritime Commission, on August 21, 1942, ordered a general investigation into certain practices of persons engaged in the Port of New York area in the business of freight forwarding in foreign commerce. On January 14, 1943, the Commission issued its order pursuant to Section 21 of the Shipping Act, *supra*, requiring the disclosure of certain specified information, within a designated time limit, by plaintiffs and other persons so engaged.

Thereafter, on February 10, 1943, plaintiffs instituted this suit against the United States under the provisions of Title 28, Sections 41 (28), 43-48, and Title 46, Section 830, of the United States Code, seeking to set aside, annul, and enjoin the Commission's order of January 14, 1943, and also the Commission's general investigative

order of August 21, 1942. On May 18, 1943, the Commission withdrew its order of January 14, 1943, but on the same date issued a substitute order under Section 21 of the Shipping Act, which, like the order withdrawn, required plaintiffs within a specified time to answer a questionnaire annexed thereto. By consent of both parties, the suit was continued, without formal amendment of the complaint, against the Commission's substituted order of May 18, 1943.

On June 15, 1943, the defendant filed its answer to the complaint and on July 2, 1943, moved for a summary judgment in its favor upon the pleadings, certain affidavits and exhibits, and the record previously made in a hearing before the Commission pursuant to the general investigative order of August 21, 1942. On July 14, 1943, plaintiffs moved for an interlocutory injunction against the enforcement of the Commission's order of May 18, 1943 and its general investigative order of August 21, 1942.

On November 30, 1943, a statutory three-judge court, convened pursuant to the provisions of Title 28, Section 47, of the United States Code, denied plaintiffs' motion for an interlocutory injunction against the general investigative order, but granted an interlocutory injunction against the order of May 18, 1943. On defendant's motion for reargument, the court, on March 7, 1944, adhered to its ruling and on November 30, 1944, on final hearing, issued a decree setting aside and

permanently enjoining the enforcement of the Commission's order of May 18, 1943. That decree is the subject of this appeal.

**THE QUESTION IS ONE OF SUBSTANCE**

The District Court, in enjoining the Commission's order of May 18, 1943, ruled that plaintiffs, although admittedly forwarders of freight for ocean shipment in foreign commerce, are not engaged in the "business of forwarding \* \* \* in connection with a common carrier by water" so as to make them responsive as "other persons subject to" the Shipping Act (Section 1, *supra*) to orders of the Maritime Commission issued pursuant to Section 21 of that Act. By the adoption of a restrictive interpretation of the words "in connection with a common carrier by water," the court has excluded from the Act's coverage all forwarders of freight for water shipment save only those who, in the court's language, are "a corporation subsidiary to or otherwise affiliated with the carrier," or those "to whom the carrier pays compensation as an inducement to ship by its line."

This construction of the Shipping Act not only denies to the Commission the right under Section 21 to require reports pertaining to the practices of freight forwarders concerned with the movement by water of goods in foreign and interstate commerce (except to the limited extent

expressed by the court), but removes such forwarders from the ambit of the Commission's regulatory power and the requirements and prohibitions in Sections 15, 16, 17, 20, 22, and 23 of the Shipping Act. The question is thus one of importance, as is evidenced by the number of plaintiffs (65) involved in this suit and the fact that many other independent freight forwarders carry on business in all the major ports of the United States.

We believe that there are substantial grounds for the contention that the court's ruling was in error. The business of forwarding is of long standing and has been precisely defined on many occasions. See *Place v. Union Express Co.*, 2 Barb. 19, 25 (N. Y. 1858), ("A forwarder is one who, for a compensation, takes charge of goods entrusted or directed, and forwards them, that is, puts them on their way to their destination by the ordinary and usual means of conveyance \* \* \*"); *In re Emerson Marlowe & Co.*, 195 Fed. 95, 98 (C. C. A. 7), in which a definition of "forwarder" appearing in the Century Dictionary is quoted with approval as follows:

Specifically in the United States, one who ships or sends forth goods for others to their destinations by the instrumentality of third persons \* \* \*. Neither a consignor shipping goods, nor a carrier engaged in transporting them is a forwarder. The

name is applied strictly to one who undertakes to see the goods of another put in the way of transportation without himself incurring the liability of a carrier to deliver them.

The Congressional intent to bring within the Shipping Act all segments of this industry, so far as connected with the transshipment of goods by water, may reasonably be inferred from the Act's language: The provision that the business of forwarding be carried on "in connection with a common carrier by water," in the absence of any evidence of a legislative intent to the contrary, is fully explained by the necessity of excluding forwarders whose business is solely in connection with commerce not regulated by the Act, such as forwarders operating in connection with rail or truck shipments. The manifest general purpose of the Act to remove potential obstructions and burdens on foreign and interstate marine transportation can best be achieved by construing the auxiliary field of regulation ("other persons subject to the Act") as coextensive with the field covered by the primary regulation.<sup>1</sup> Just as there could be no basis for construing the Act to cover

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<sup>1</sup> The court in its opinion indicated that it deemed that the sole purpose of the Act was to prevent discrimination against shippers. That this view is incorrect is manifest from provisions of the Act obviously designed to prevent unfair competitive practices between the carriers themselves. See, e. g., the provision of Section 14 (46 U. S. C. 812) relating to "fighting ships."

freight forwarders not connected with the primary field of regulation—marine transportation in foreign and interstate commerce—so there is no basis for construing it to exclude any freight forwarders who are concerned with the main field of regulation. Any requirement that the Commission's jurisdiction over forwarders be made to turn on fine distinctions as to the degree of the forwarder's affiliation with or control by a carrier is unwarranted, we believe, in view of the broad language actually employed and the liberal construction to which remedial legislation such as the Shipping Act is entitled. Improper practices by freight forwarders may be deleterious to the interests of shippers and carriers alike, irrespective of whether the forwarder is independent of or is affiliated with any particular carrier.

The ruling of the District Court in the instant case would seem to be contrary to the decision in *California v. United States*, 320 U. S. 520, where it was argued that the State of California and the City of Oakland, owners and operators of various terminal facilities in the San Francisco Bay area, were not in "the business of \* \* \* furnishing \* \* \* warehouse or other terminal facilities in connection with a common carrier by water" so as to constitute them "other persons subject to" the act within the meaning of Section 1 thereof, because such services were furnished to the consignee and the water carrier had

no interest therein. (See Brief for the State of California, pp. 322-326, in No. 20, October Term 1943, and Brief for the City of Oakland, pp. 102-106 in No. 22, October Term 1942.) The court summarily disposed of this contention, stating (320 U. S. at 586):

And whatever may be the limitations implied by the phrase "in connection with a common carrier by water" which modifies the grant of jurisdiction over those furnishing "wharfage, docks, warehouses, or other terminal facilities", there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission.

Similarly, we believe, there should be no doubt as to the Commission's jurisdiction over the activities of the plaintiffs.<sup>2</sup>

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<sup>2</sup> The case relied upon by the court, *LeHigh Valley Railroad Co. v. United States*, 243 U. S. 444, is not controlling. It was there held that the services of a forwarder in advertising and soliciting traffic for the railroad, "although connected with" railroad transportation "in a practical sense," "were not connected with it as a necessary part of the carriage—were not 'transportation service'" (243 U. S. 446-447) so as to permit allowance by the railroad, otherwise prohibited, to the forwarder of reduced rates or rebates permitted by Section 15 (13) of the Interstate Commerce Act (49 U. S. C. Sec. 15). The holding that the services of the forwarder were not a necessary part of the carriage is irrelevant in the present circumstances since no such requirement for the exercise of jurisdiction exists in the Shipping Act.

There are appended hereto copies of the decisions and decree of the court.

THE UNITED STATES OF AMERICA,  
By (Sgd) CHARLES FAHY,

Charles Fahy,

*Solicitor General.*

By (Sgd) JOHN F. X. McGOHEY,

John F. X. McGohey,

*United States Attorney.*

United States District Court, Southern District of  
New York

Civ. 20/360

AMERICAN UNION TRANSPORT, INC., ET AL.,  
PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

Suit by American Union Transport, Inc., and  
others to obtain an injunction against enforcement  
of an order of the Maritime Commission.

Harold L. Allen, Attorney for plaintiffs.

John F. X. McGohey, United States Attorney,  
for defendant; Marvin M. Notkins, Assistant  
United States Attorney, of counsel.

Before SWAN, Circuit Judge, and CAFFEY and  
COXE, District Judges.

SWAN, C. J.:

This case is now before us on final hearing.  
The evidence introduced is identical with that  
presented when the plaintiff's motion for interloc-  
utory injunction and the defendant's motion for  
summary judgment were heard. At that time the  
court rendered an opinion which is reported in 55  
F. Supp. 682. We see no reason to add anything  
to that opinion. Nor are our findings of fact on

final hearing different in any material respect from those made when the motion for interlocutory injunction was under consideration. The plaintiffs are entitled to a permanent injunction against enforcement of the order of the Maritime Commission dated May 18, 1943. Dated: November 29, 1944.

[s] THOMAS W. SWAN,  
*U. S. Circuit Judge.*

[s] ALFRED C. COXE,  
*U. S. District Judge.*

[s] FRANCIS G. CAFFEY,  
*U. S. District Judge.*

FILED Nov. 30, 1944.

*American Union Transport, Inc., et al. v. United States.* District Court, S. D. New York. Nov. 30, 1943. On Rehearing March 7, 1944.

SWAN, Circuit Judge.

The plaintiffs are corporations, partnerships and individuals engaged in business in the Port of New York as forwarders of freight in foreign commerce. Alleging that they are not persons subject to the Shipping Act of 1916 and the amendments thereof, 46 U. S. C. A. Chap. 23, §§ 801-842, they brought this suit against the United States pursuant to § 31 of the Shipping Act, 46 U. S. C. A. § 830, whereby the venue and procedure in suits to restrain enforcement of any order of the Maritime Commission are made the same as in similar suits respecting orders of the

Interstate Commerce Commission. See 28 U. S. C. A. §§ 41 (28), 43-48. The complaint attacks two orders of the Maritime Commission made on August 21, 1942, and January 14, 1943, respectively.

The order of August 21, 1942, recites that each of the plaintiffs and others similarly engaged in "the business of forwarding in foreign commerce" is an "other person subject to this Act" within the meaning of that term as used in §§ 1 and 17 of the Shipping Act, 46 U. S. C. A. §§ 801, 816; that a specified corporation (not one of the plaintiffs) had engaged in practices which violated section 17 of the Act; and that the public interest requires a general inquiry to determine the extent of the existence of such practices among other forwarders in the Port of New York. It ordered that the Commission upon its own motion and without formal pleading "enter upon an investigation with a view toward making such order or orders or taking such other action in the premises as may be warranted by the record"; and that the plaintiffs and other forwarders named in an appendix to the order be made respondents in the proceeding. After the issuance of this order the Commission sent to all the respondents named therein a questionnaire which propounded, among other questions, the following: "Do you carry on the business of forwarding in connection with common carriers by water in foreign commerce?" All

the plaintiffs answered this question in the affirmative, but allege in their complaint that this answer was erroneous. Thereafter on December 9 and 10, 1942, public hearings were held, and on the date last named the hearing was adjourned sine die to enable the Commission to obtain further information for a later resumption of the investigation. On January 14, 1943, the Commission on its own motion and purporting to exercise powers conferred by section 21 of the Act, 46 U. S. C. A. § 820, ordered the plaintiffs and others to answer within 30 days a questionnaire which required a lengthy report of business they had transacted in specified periods during 1940, 1941 and 1942, with break-downs of their receipts and disbursements. The plaintiffs thereupon brought the present suit.

A motion for an interlocutory injunction being made, a court of three judges was formed pursuant to 28 U. S. C. A. § 47. Thereafter the defendant filed its answer and moved for summary judgment in its favor upon the pleadings, exhibits, affidavits and evidence introduced at the Commission's hearings. Both motions were heard together on July 15, 1943. Decision was deferred at the request of the parties in order that they might later submit briefs, which they have done.

From the defendant's answer and exhibits attached thereto it appears that on May 18, 1943, the Commission vacated its order of January 14, 1943 and substituted therefor another order and ques-

tionnaire which required a similar but somewhat less burdensome report of business to be filed by the plaintiffs within 45 days from the date of the order. The plaintiffs have not formally amended their complaint to cover the May 18th order but both parties desire us to pass upon the validity of that order. Consequently we shall proceed upon the assumption that the complaint has been amended so that all allegations as to the order of January 14, 1943, except those referring to failure to submit the questionnaire to the Director of the Budget, now refer to the order of May 18th.

In respect to the order of August 21st the plaintiffs must fail. This is not the kind of order which the District Court is given jurisdiction to annul under 28 U. S. C. A. §§ 41 (28), 46, 47. See *United States v. Illinois Cent. R. Co.*, 244 U. S. 82, 89, 37 S. Ct. 584, 61 L. Ed. 1007; *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309, 47 S. Ct. 413, 71 L. Ed. 651; *Shannehan v. United States*, 303 U. S. 596, 601, 58 S. Ct. 732, 82 L. Ed. 1039; *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 130, 59 S. Ct. 754, 83 L. Ed. 1147. The order of August 21st does not of itself adversely affect the plaintiffs; although it recites that they are subject to the Act, it does not con-

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The defendant's answer alleges that the Director of the Budget approved the form and contents of the questionnaire annexed to the order of May 18th. See sec. 5, 56 Stat. 1078, 50 U. S. C. A. Appendix, § 139e.

strain them to do or refrain from doing anything; their rights will be adversely affected only on the contingency of future administrative action. It is like an order of the Interstate Commerce Commission setting a case for hearing despite a challenge to its jurisdiction, as in the Illinois Central case, *supra*. Whether the Maritime Commission has jurisdiction to enter, on its own motion, upon a general investigation of the practices of freight forwarders is immaterial so far as the August 21st order is concerned. Even if jurisdiction were lacking, the order directing the investigation did not adversely affect the plaintiffs; nor does that part of the order which names them as respondents. They are under no constraint to appear at the investigation, if hearings shall be resumed.

The situation is different with respect to the May 18th order. This directs affirmative action on the part of the plaintiffs, and for failure to comply with the order the statute imposes a penalty at the rate of \$100 for each day of default. 46 U. S. C. A. § 820. The power of the Commission to make such order being in dispute, the need for injunctive relief is at least as great as it is with respect to orders of the type discussed by Mr. Justice Frankfurter as "Group (2)" in the Rochester Telephone opinion, 307 U. S. at pages 132-134, 59 S. Ct. at pages 758, 759, 83 L. Ed. 1147. If the Commission has exceeded its statu-

tory powers, this court has jurisdiction to enjoin enforcement of the order. 46 U. S. C. A. § 830; *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 562, 39 S. Ct. 375, 63 L. Ed. 772.

The order purports to be issued pursuant to § 21, 46 U. S. C. A. § 820, which authorizes the Commission to require "any common carrier by water, or other person subject to this chapter" to file "any periodical or special report" or "any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter." Unless the plaintiffs are persons "subject to" Chapter 23 of Title 46 the Commission lacks power to require them to file with it answers to the questionnaire annexed to the order of May 18th. Whether the chapter does subject them to its provisions turns upon the definitions contained in § 1, 46 U. S. C. A. § 801, and the nature of the plaintiffs' business. The section begins with a definition of the terms "common carrier by water in foreign commerce" and "common carrier by water in interstate commerce." It then defines "common carrier by water" as meaning either of such previously defined common carriers. Next follows the definition which has given rise to the present litigation: "The term 'other person subject to this Act' means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock,

warehouse, or other terminal facilities in connection with a common carrier by water."

There is no substantial dispute as to the plaintiffs' business activities. The complaint alleges that all of the plaintiff's are engaged in the business of shippers' agents and freight brokers in the Port of New York; they arrange, as agents for others, "for insurance, cartage, warehousing, and other services, incidental to and including the affreightment of merchandise consigned to and from points within the United States, from and to points outside thereof"; they do not assume responsibility for delivery of the merchandise at destination. The affidavit of Herbert A. Byrne attached to the motion for an interlocutory injunction describes in greater detail how the business is done. There is nothing before us which contradicts in any essential respect his statements. He makes it clear that the "forwarder" acts solely as agent for the owner of goods in procuring their transportation by a common carrier by water and in performing services incidental to procuring such transportation. Usually the bill of lading is taken in the name of the owner of the goods; occasionally the forwarder may consolidate into one shipment goods of different owners, if the goods are similar in character and bound for the same port and the same consignee, and in the case of such a shipment the bill of lading is taken in the name of the forwarder. But in either case

the forwarder's relationship to the owner is that of agent and his relationship to the carrier is that of shipper's agent or shipper. See *Lehigh Valley R. Co. v. United States*, 243 U. S. 444, 445, 37 S. Ct. 434, 61 L. Ed. 839.

The question for decision is whether the activities above outlined constitute carrying on the business of forwarding "in connection with a common carrier by water." If the forwarder's connection with the carrier need be nothing more than the making of contracts of affreightment, either in the name of the owner of the goods to be transported or in the forwarder's own name, then plainly the plaintiffs are persons subject to the Act. But in our opinion the statutory clause under consideration contemplated a relationship between forwarder and carrier closer than that resulting merely from a contract of affreightment. The Shipping Act was a comprehensive measure intended to subject common carriers by water to substantially the same type of regulation as the Interstate Commerce Act, 49 U. S. C. A. § 1 et seq., imposed on interstate common carriers by land. See *United States Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474, 480, 52 S. Ct. 247, 76 L. Ed. 408. The incidence of regulation was intended to fall upon the carrier and those who act in connection with it in such a manner as to make possible discrimination between shippers. Some large steamship companies maintain their own

forwarding organizations. See House Report No. 1682, 77th Congress, 2d Session. Such an organization may take the form of a corporation subsidiary to or otherwise affiliated with the carrier, or may be an independent forwarder to whom the carrier pays compensation as an inducement to ship by its line, as in *Lehigh Valley R. Co. v. United States*, 243 U. S. 444, 37 S. Ct. 434, 61 L. Ed. 839. Where the relationship between carrier and forwarder is of such a character, regulation of the forwarder is an appropriate and perhaps necessary means of preventing discrimination. But where the relationship of the forwarder to the carrier is only that of consignor or shipper's agent regulation of the forwarder is not necessary, since the provisions forbidding the carrier to discriminate between shippers will suffice. Similar considerations apply with respect to those who furnish "wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." Such facilities are customarily furnished under some form of continuing contractual or other relationship with the common carrier by water which may result in discrimination against or unfair advantage to shippers, if those who furnish the facilities are not regulated. Such was the case in *State of California v. United States*, D. C. Cal., 46 F. Supp. 474, now pending in the Supreme Court, 63 S. Ct. 980, the only

\* Affirmed 320 U. S. 577, 94 S. Ct. 352.

authority brought to our attention which has construed the phrase in question. We do not believe that the Shipping Act was intended to extend to the regulation of the rates and practices of independent forwarders or furnishers of terminal facilities, who perform services solely for the shipper and at his expense and whose dealings with the carrier are limited to contracting for transportation at the carrier's established rates. Compare *Lehigh Valley R. Co. v. United States*, 243 U. S. 444, 37 S. Ct. 434, 61 L. Ed. 839, where forwarding services of the same character as those rendered by the present plaintiffs were held not to be "connected with such transportation" within the meaning of that phrase as used in section 15 (13) of the Interstate Commerce Act, 49 U. S. C. A. § 15 (13). The construction of the Shipping Act for which the defendant contends would expand the regulation beyond anything heretofore asserted. Even the recent Act, 56 Stat. 284, 49 U. S. C. A. § 1001 et seq., bringing domestic freight forwarders within the jurisdiction of the Interstate Commerce Commission excludes by definition forwarders who assume no responsibility for the transportation of the merchandise.

For the foregoing reasons the complaint in so far as it seeks an injunction against the order of August 21st is dismissed; an interlocutory injunction against enforcement of the order of May 18, 1943, is granted; and the defendant's motion for

summary judgment is denied. Either party may submit proposed findings of fact on five days' notice to the other.

Filed Nov. 30, 1943.

ON MOTION FOR REARGUMENT

This motion asks a modification of our opinion of November 30, 1943 in so far as it denied the defendant a summary judgment and granted the plaintiffs an interlocutory injunction against enforcement of the Commission's order of May 48, 1943. Argument of the motion was heard on December 16, 1943 and the matter was taken under advisement with leave to the attorneys to file briefs. A brief has been filed on behalf of the plaintiffs. On February 19, 1943 counsel for the defendant advised the court that he did not desire to file a brief on behalf of the defendant.

Our former decision in this case was rested upon the ground that the plaintiffs were not shown to be carrying on the business of forwarding "in connection with a common carrier by water." The opinion stated that there was nothing before the court to contradict in any essential respect the Byrne affidavit which made clear that a forwarder "acts solely as agent for the owner of goods in procuring their transportation by a common carrier by water and in performing services incidental to procuring such transportation." Mr. Hallett's affidavit in support of the motion for

reargument asserts that we overlooked certain evidence, not called to our attention upon the original argument or in the briefs then filed, which shows that the plaintiffs' activities are not limited solely to acting as agents for shippers. This evidence is to be found in five volumes containing answers to questionnaires filed with the Commission by numerous forwarders, including the plaintiffs, and submitted to the court on the argument of the original motions. It relates to two matters: (1) "contract rates" and (2) brokerage.

(1) Contract rates. Question 22 of the questionnaire requires information as to whether the forwarder who answered the question signed contracts with steamship conferences or conference carriers entitling him to contract rates. Mr. Hallett's affidavit states that 45 of the plaintiffs (without specifying which plaintiffs) made answers indicating that they did enter into such contracts. By their answer to question 23, most of the plaintiffs, Mr. Hallett says, professed to give the shipper the benefit of the contract rate but he names three plaintiffs who did not always do so. We find no copy of a contract for "contract rates" in the record. The terms of such contracts and their implications have not been submitted to us; they can be developed upon final hearing. Without knowing more we cannot say from the mere fact that some of the plaintiffs entered into contracts for contract rates, that they

were conducting their forwarding business "in connection with a common carrier" in such sense as to justify a summary judgment for the defendant. Nor is it clear to us what bearing on this question the ultimate enjoyment of contract rates, by the shipper or by the forwarder, might have. That too may be elucidated on a full hearing of the cause.

(2) Brokerage. From the answers to questions 29, 30 and 31 of the questionnaire it appears that every plaintiff receives a commission or brokerage fee from the carrier with respect to shipments for which he acts as forwarder; all but six do this in cases where they make the shipments in their own names as shipper on the bill of lading, and every plaintiff collects forwarding fees from the shipper on the same shipment on which it collects brokerage from the carrier. Some of the plaintiffs say that their forwarding fees are based on the assumption that they will collect 1 $\frac{1}{4}$ % brokerage on ocean freight. Hence the defendant argues that receipt of brokerage from the carrier, where broker and forwarder are one, shows that each plaintiff carries on the business of forwarding in connection with a common carrier by water and is therefore within the statutory definition of 46 U. S. C. A. § 801. The plaintiffs answer that payment of brokerage is provided for in the carriers' tariffs, and that the legality of the practice has been recognized by the Commission in Gulf Brokerage and Forwarding Agreements, 1 U. S.

M. C. 533. This was a proceeding concerning 92 agreements filed for approval under § 15 of the Shipping Act, 46 U. S. C. A. § 814, by common carriers by water in foreign commerce and other persons termed brokers. The agreements purported to fix the amounts of commissions the carriers would pay such other persons for brokerage services, and also the amounts of the charges to be collected from shippers for forwarding services to be performed by the carriers and such other persons. An order was entered denying approval of the proposed agreements and discontinuing the proceeding without prejudice to the filing of new agreements as indicated in the opinion. The opinion states: "Brokers are not subject to the Shipping Act of 1916 and consequently agreements between carriers subject to that Act and brokers are not of the character required to be filed under § 15 thereof."

The mere receipt of brokerage from a carrier by one who is also a forwarder connotes no contract between the payor and payee other than that which arises out of the contract of affreightment. There is no implication that the forwarder agrees with the carrier to refuse to handle shipments as to which the shipper has specified routing by a competing carrier (which as the Commission noted in the opinion just discussed, it would not approve). We do not think the receipt of brokerage pursuant to a carrier's filed tariff

proves that the forwarder who receives it carries on the business of forwarding "in connection with the carrier."

The evidence called to our attention by the motion for reargument does not justify the granting of a summary judgment for the defendant. Consequently we adhere to our former opinion and for the reasons therein stated think that an interlocutory injunction should be granted the plaintiffs.

Filed Mar. 8, 1944.

United States District Court, Southern District of  
New York

Civ. 20-360

AMERICAN UNION TRANSPORT, INC., ET AL.,  
PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

This cause having come on for trial before the undersigned on the 9th day of November, 1944, and the proofs of both parties having been adduced, and the plaintiffs having appeared by Harold L. Allen, Esq., and the defendant having appeared by John F. X. McGahey, United States Attorney for the Southern District of New York (Marvin M. Notkins, Assistant United States Attorney, of counsel), the Court now makes the following findings of fact and conclusions of law.

**FINDINGS OF FACT**

1. The plaintiffs are corporations, copartnerships and individuals engaged in business in the Port of New York, Southern District of New York, as forwarders of freight "in foreign commerce".
2. The plaintiffs brought this action against the United States pursuant to Title 46, U. S. Code,

Section 830, to set aside orders hereafter described of the United States Maritime Commission.

3. One of the orders of said Maritime Commission which the plaintiffs sought to set aside was issued on August 21, 1942, in a proceeding entitled "Port of New York Freight Forwarders Investigation, Docket No. 621." Said order recited that each of the plaintiffs and a large number of other persons, who are not parties to this action, were engaged in the business of forwarding in foreign commerce; that each of them is an "other person subject to" the Shipping Act of 1916 as amended; that the public interest requires a general inquiry to determine the extent of the existence of certain practices and the lawfulness thereof under said Act; and it ordered that said Maritime Commission upon its own motion and without formal pleadings "enter upon an investigation with a view toward making such order or orders or taking such other action in the premises as may be warranted by the record".

4. Said order of August 21, 1942 does not of itself adversely affect plaintiffs; it does not constrain them to do or refrain from doing anything, and accordingly by an order of this Court dated June 12, 1944 the complaint was dismissed in so far as it sought an injunction against said order of the Maritime Commission dated August 21, 1942.

5. On January 14, 1943, said Maritime Commission issued an order which directed the plaintiffs to answer within thirty days a questionnaire thereto annexed which required a lengthy report of business transacted during specified periods in 1940, 1941 and 1942, with breakdowns of their receipts and disbursements. The time for furnishing the required information was extended to April 15, 1943, and again to June 1, 1943. Said order of January 14, 1943 bore no approval of the Director of the Bureau of the Budget prior to its issuance and service upon the plaintiffs. The plaintiffs prayed for an injunction against the enforcement of said order but on May 18, 1943 said Maritime Commission vacated its order of January 14, 1943.

6. On May 18, 1943 said Maritime Commission made a new order which directed the plaintiffs to answer within forty-five days, under penalty of forfeiting one hundred dollars for each day of default, as provided in 46 U. S. Code, Section 820, a questionnaire thereto annexed which required a lengthy report of plaintiffs' business and directed them to file with said Maritime Commission a true and accurate report of 105 individual forwarding transactions, 35 of which were billed consecutively to their customers commencing January 1, 1940, 35 of which were billed consecutively to their customers commencing June 1, 1941, and 35 billed consecutively to their customers commencing June

1, 1942. Said order of May 18, 1943 bears the approval of the Director of the Bureau of the Budget.

7. The plaintiffs have not formally amended their complaint to cover the order of May 18, 1943, but a copy of said order is annexed to the answer of the defendant and by the consent of both parties the question of the validity of said order has been submitted to this Court. All allegations in the complaint with respect to the order of January 14, 1943 except those referring to the failure to submit the questionnaire to the Director of the Bureau of the Budget are deemed to refer to the order of May 18, 1943.

8. All of the plaintiffs are engaged in the business of shippers' agents and freight brokers; they arrange as agents for others for insurance, cartage, warehousing and other services incidental to and including the affreightment of merchandise consigned to and from points within the United States from and to points outside thereof. They do not assume responsibility for the delivery of the merchandise at destination.

9. The plaintiffs usually take the bill of lading in the name of the owner of the goods. Occasionally the bill of lading is taken in the name of the plaintiff forwarder, if the goods being shipped are similar in character and bound for the same port and the same consignee. As forwarders, the plaintiffs perform services solely for the shipper and at his expense.

10. The plaintiffs also act as freight brokers. When a plaintiff as forwarder also acts as freight broker, he receives a brokerage commission or fee from the carrier with respect to the shipment for which he acts as forwarder and collects a forwarding fee from the shipper.

11. The plaintiffs have no continuing contractual or other relationship with the common carriers by water over whose lines they ship merchandise.

12. After the issuance of its order of August 21, 1942 said Maritime Commission sent to the plaintiffs a questionnaire which contained the question: "Do you carry on the business of forwarding in connection with common carriers by water in foreign commerce?" All the plaintiffs answered this question in the affirmative. In their complaint in this action the plaintiffs allege that their answer to the aforesaid question was erroneous. The evidence before this Court contradicts the admission made by said affirmative answer. The plaintiffs do not carry on the business of forwarding in connection with common carriers by water within the meaning of the Shipping Act of 1916 as amended.

#### CONCLUSIONS OF LAW.

1. This Court was duly convened pursuant to 28 U. S. C. § 47 and has jurisdiction pursuant to Section 31 of the Shipping Act of 1916 } as amended, 46 U. S. C. § 830.

2. The plaintiffs are not "other persons subject to" the Shipping Act of 1916 as amended.
3. The Maritime Commission lacks jurisdiction to direct the plaintiffs to answer the questionnaire annexed to its order of May 18, 1943.
4. The plaintiffs are entitled to a permanent injunction against the enforcement of said order of May 18, 1943.

THOMAS W. SWAN,

*U. S. C. J.*

ALFRED C. COXE,

*U. S. D. J.*

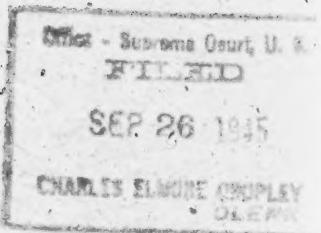
FRANCIS G. CAFFEY,

*U. S. D. J.*

Dated: New York, N. Y. November 29, 1944.

FILED Nov. 30, 1944.

FILE COPY



No. 44

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN UNION TRANSPORT, INC., D. C. ANDREWS  
& Co., INC., ATLANTIC FORWARDING CO., INC.,  
ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 44

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN UNION TRANSPORT, INC., D. C. ANDREWS  
& CO., INC., ATLANTIC FORWARDING CO., INC.,  
ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinions of the specially constituted three-judge District Court for the Southern District of New York on motion for an interlocutory injunction (R. 119-124) and on motion for reargument (R. 124-126) are reported in 55 F. Supp. 682. Its opinion on final hearing (R. 119) is not reported.

### JURISDICTION

The final judgment of the district court was entered on November 30, 1944 (R. 129-130). The

petition for appeal (R. 130-131) was allowed on January 27, 1945 (R. 132-133). This Court noted probable jurisdiction on April 2, 1945 (R. 139). The jurisdiction of this Court is invoked under Section 31 of the Shipping Act of 1916 (39 Stat. 728; 46 U. S. C. 830), the Urgent Deficiencies Act of 1913 (38 Stat. 220; 28 U. S. C. 47a), and Section 238 of the Judicial Code (43 Stat. 938; 28 U. S. C. 345).<sup>1</sup>

#### **STATUTE INVOLVED**

The relevant portions of the Shipping Act of 1916 (39 Stat. 728; 46 U. S. C. 801 *et seq.*) are set forth in the Appendix, *infra*, pp. 35-44.

#### **QUESTION PRESENTED**

Whether appellees, who are engaged in business in the Port of New York area as forwarders of freight for transshipment by common carriers by water in foreign commerce, are "carrying on the business of forwarding" \* \* \* in connection with a common carrier by water within the meaning of Section 1 of the Shipping Act of 1916.

#### **STATEMENT**

This is an appeal from a permanent injunction granted by a specially constituted three-judge court, convened pursuant to Section 31 of the

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<sup>1</sup> In *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, and in *California v. United States*, 320 U. S. 577, this Court entertained appeals from district courts based on these provisions.

Shipping Act of 1916,<sup>2</sup> setting aside an order issued on May 18, 1943, by the United States Maritime Commission (the "Commission") under Section 21 of the Act (46 U. S. C. 820), requiring appellees among others to file with the Commission answers to a questionnaire concerning certain aspects of their past business transactions. Proceedings prior to the rendition of the final judgment of the court below were as follows:

On August 21, 1942, the Commission, on its own motion under Section 22 of the Act, ordered an investigation into the rules, regulations, practices and operations of persons engaged in the port of New York area in the business of forwarding freight in foreign commerce (R. 11-15, 48). Reciting that a certain freight forwarder (not one of the appellees) had violated Section 17 of the Act, the order of August 21, 1942, asserted that "the public interest requires a general inquiry to determine the extent of the existence of the said practices among all other forwarders in the port of New York subject to said Act" (R. 11-12). The order as subsequently amended named a large number of per-

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<sup>2</sup> That Section provides that the "procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the [Commission] \* \* \* shall \* \* \* be the same as in similar suits in regard to orders of the Interstate Commerce Commission \* \* \*" (46 U. S. C. 830). The procedure in respect of the Interstate Commerce Commission is fixed by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220 (28 U. S. C. 47, 47a)\*.

sons, including the 66 appellees here involved, as respondents in the proceedings, averring that each carried on the "business of forwarding in foreign commerce" and was therefore an "other person subject to" the Act (R. 11, 12).

Thereafter (R. 4), the Commission sent to all the respondents named in its order of August 21, 1942, a preliminary questionnaire (R. 136-138) which propounded, among others, the question: "Do you carry on the business of forwarding in connection with common carriers by water in foreign commerce?" Each of the appellees herein answered this question in the affirmative (R. 5, 24).

On December 9 and 10, 1942, public hearings were held before a trial examiner of the Commission in pursuance of the investigation. On the latter date the hearings were adjourned *sine die* to enable the Commission to obtain further information pending a resumption thereof. (R. 120.)

On January 14, 1943, the Commission issued an order (R. 19-23) under Section 21 of the Act requiring appellees and others to file answers within 30 days to another questionnaire concerning their forwarding operations in 1940, 1941 and 1942. (R. 23). On February 11, 1943, prior to the expiration of the 30-day time limit,<sup>3</sup> appellees instituted this suit to enjoin enforcement of the

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<sup>3</sup> Section 21 prescribes a \$100 per day penalty for failure "to file any report \* \* \* as required by this section." Appendix, *infra*, p. 42.

Commission's general investigative order of August 21, 1942, and its Section 21 order of January 14, 1943, on the principal ground that appellees are not "other persons" subject to the Act within the meaning of Sections 1 and 21 thereof (R. 1-11). On May 18, 1943, following the entry of orders extending the time within which to respond to the Commission's questionnaire (R. 26-27), the Commission withdrew its order of January 14, 1943, but at the same time issued a substitute order under Section 21 of the Act (R. 27-28) which, like the order withdrawn, required appellees and others to answer within a specified time a questionnaire (R. 29) annexed thereto.<sup>4</sup> By consent of both parties, appellees' suit was continued, without formal amendment of the complaint, against the Commission's substituted order of May 18, 1943 (R. 121, 128).

The United States filed an answer to the complaint on June 17, 1943 (R. 24-29), and on July 2, 1943, moved for summary judgment upon the pleadings, certain affidavits and exhibits, and the record previously made in the administrative hearings held pursuant to the general investigative order of August 21, 1942 (R. 30). On July 14, 1943, appellees moved for interlocutory injunctions against the enforcement of the Com-

<sup>4</sup> This questionnaire, unlike that attached to the order of January 14, 1943, carried the approval of the Director of the Budget (R. 28-29).

mission's order of May 18, 1943, and its general investigative order of August 21, 1942 (R. 38-39).

On November 30, 1943, the statutory three-judge court below denied the appellant's motion for summary judgment and also denied appellees' requested injunction against the Commission's general investigative order on the ground that it did not adversely affect appellees' legal rights. The court, however, granted an interlocutory injunction against the Commission's order of May 18, 1943, holding that appellees are not "carrying on the business of forwarding \* \* \* in connection with a common carrier by water" within the meaning of the Act (R. 119-124). On appellant's motion for reargument of this phase of the court's opinion, the court, on March 8, 1944, issued a second opinion (R. 124-126) adhering to its previous ruling, and on November 30, 1944, after final hearing, it entered findings of fact (R. 126-129), conclusions of law (R. 129), and a final judgment (R. 126-130) permanently enjoining enforcement of the Commission's order of May 18, 1943, on the ground above stated.

In their petition, appellees stated that they "are engaged in arranging, in usual course of \* \* \* business, and as agents for others, for insurance, cartage, warehousing, and other services incidental to and including the affreightment of merchandise consigned to and from points within the United States, from and to points out-

side thereof; the services of [appellees] and their responsibilities to shippers in connection therewith being confined, in the ordinary course of business, to the terminal area \* \* \* [of the Port of New York], and [appellees] do not assume responsibility for delivery thereof at destinations" (R. 2). The court below found that appellees are "engaged in business \* \* \* as forwarders of freight in foreign commerce" (R. 127). The court also found that appellees, "forwarders of freight in foreign commerce" in the Port of New York area, arrange for the "affreightment of merchandise consigned to and from points within the United States from and to points outside thereof", without assuming responsibility for the delivery of the merchandise at destination (R. 128).

#### SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In making and entering its final decree setting aside, suspending and annulling the order of the United States Maritime Commission dated May 18, 1943, and permanently enjoining the appellant, its agents, servants and attorneys from in any manner enforcing or instituting any proceeding for the enforcement of said order.
2. In failing to grant summary judgment to the appellant or to dismiss the complaint as being without equity.

3. In concluding that appellees are entitled to a permanent injunction against the enforcement of the said order of the United States Maritime Commission of May 18, 1943.

4. In finding and concluding that appellees and each of them are not an "other person" as defined in the Shipping Act of 1916, as amended.

5. In failing to hold that each of the appellees is an "other person" within the meaning of said Act and is subject to the jurisdiction of the United States Maritime Commission and to its orders issued pursuant to Section 21 of said Act.

6. In finding and concluding that appellees do not carry on the business of forwarding in connection with common carriers by water within the meaning of Section 1 of said Act.

7. In holding that only persons carrying on the business of forwarding who are "a corporation subsidiary to or otherwise affiliated with" a common carrier by water, or "to whom the carrier pays compensation as an inducement to ship by its line" (R. 123) are subject to the jurisdiction of the Maritime Commission and to its orders issued pursuant to Section 21 of said Act.

8. In finding that appellees have no continuing contractual or other relationship with common carriers by water over whose lines they ship merchandise.

9. In finding that the evidence contradicted admissions previously made by appellees that they

do carry on the business of freight forwarding in connection with common carriers by water in foreign commerce.

#### SUMMARY OF ARGUMENT

Section 21 of the Shipping Act of 1916, as amended, enables the Commission to require, as by its order of May 18, 1943, involved here, the filing of "special report[s] \* \* \* or any memorandum of any facts and transactions appertaining to the business of \* \* \* other person[s] subject to this Act," who are defined by Section 1 thereof to include "any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." Since appellees are engaged in "carrying on the business of forwarding" as that occupation has traditionally been defined, and since their activities immediately precede the carriage of goods by, or occur upon their receipt from, common carriers by water, the definition of "other persons" in the Act would seem precisely to cover such enterprises.

The interpretation placed by the court below upon the words "in connection with a common carrier by water" which modify the grant of jurisdiction over those engaged in the forwarding business, however, is that coverage was not

intended unless the forwarder is "a corporation subsidiary to or otherwise affiliated with the carrier, or \* \* \* [is one] to whom the carrier pays compensation as an inducement to ship by its line." Such a restrictive reading of broad language, it is submitted, is unjustified. In the only known reported federal cases where an issue has been raised as to the nature and extent of the modifying phrase, *California v. United States* and *City of Oakland v. United States*, both at 320 U. S. 577, state and municipal wharfingers, possessing neither of the qualifications thought by the court below to be implied by the requirement that the businesses of "other persons" be "in connection with" common carriers, were held subject to regulation under the Act. The view herein urged that the phrase is broadly descriptive of a general relationship with the primary field of regulation ("common carriers by water," as defined in the Act) finds support, moreover, in the holding in these cases that (320 U. S. at 586):

\* \* \* whatever may be the limitations implied by the phrase "in connection with a common carrier by water" \* \* \*, there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission.

The legislative history, while nowhere reaching the precise point at issue, contains no hint of an intent to create a dichotomy in the field of marine

forwarding between affiliated and independent forwarders. In the absence of legislative indicia to the contrary, the construction here urged is aided by the established canons that remedial legislation should be broadly construed and that statutory language should ordinarily be given its normal meaning. That appellees are easily embraced within a normal reading of the definition of "other persons" as including those "engaged in the business of forwarding \* \* \* in connection with a common carrier by water" is apparent from the crucial facts that their businesses exist only by reason of their acquired knowledge of carriers' rates, routes, and schedules, and of the documentation and packaging necessary to render freight transportable by such carriers. As in *California v. United States*, 320 U. S. 571, appellees' activities, which culminate in the making of contracts of affreightment with common carriers on export freight handled by them, occur in the terminal area immediately prior to the shipment of freight by, or upon its receipt from, common carriers.

Finally, the statutory purpose is defeated if independent forwarders like these, "necessary and vital agencies in the promotion of an American merchant marine" and not otherwise regulated, are at liberty to ignore the Act's requirements as to the conduct of auxiliary services. Section 17 of the Act provides that "every other person subject to this Act shall establish \* \* \* just and reasonable regulations and practices related

to or connected with the receiving, handling, storing, ~~or~~ delivering of property". The effectiveness of this and kindred Sections designed to protect the public should not depend on whether or not forwarders are affiliated with or compensated by carriers. And, to the extent that affiliation or compensation imports an agency relationship between the forwarder and carrier, the definition of "other persons" as those "not included in the term 'common carrier by water'" would seem superfluous under the construction given it below. Moreover, the Commission would be able to strike at such arrangements, if improper, by proceeding directly against the carrier involved.

#### **ARGUMENT**

##### **THE APPELLEES ARE ENGAGED IN THE BUSINESS OF FORWARDING IN CONNECTION WITH A COMMON CARRIER BY WATER WITHIN THE MEANING OF SECTION 1 OF THE SHIPPING ACT**

The Shipping Act of 1916, as amended, confers upon the Maritime Commission certain regulatory powers over two classes of persons: (1) "common carrier by water," defined, with certain exceptions, to mean a "common carrier engaged in the transportation by water of passengers or property" in interstate or foreign commerce, and (2) "other persons subject to this Act," defined to cover "any person not included in the term 'common carrier by water,' carrying on the business of forwarding or

furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water" (Section 1; see Appendix, *infra*, pp. 35-36). The function of the Commission which gives rise to this case is its power, under Section 21 of the Act, to require "any common carrier by water, or other person subject" to the Act "to file with [the Commission] any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person \* \* \*" (Appendix, *infra*, p. 42).<sup>5</sup>

As the Commission's questionnaire of May 18, 1943, falls squarely within the definition of the reports which it may require of persons subject to the Act, there can be no doubt that appellees are responsive thereto if their activities constitute "carrying on the business of forwarding \* \* \* in connection with a common carrier by water."

That appellees are engaged in "carrying on the business of forwarding" is similarly not open to

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<sup>5</sup> "Other persons" subject to the Act are likewise subject to the requirements, prohibitions and liabilities imposed by Sections 15, 16, 17, 20, 22 and 23 of the Act. The partial repeal effected by Part III of the Interstate Commerce Act (49 U. S. C. 901 *et seq.*) of these Sections and Section 21 insofar as they relate to water carriers does not affect the Commission's powers of regulation thereunder insofar as "other persons" subject to the Act are concerned. See Section 320 (b) (3) of the Interstate Commerce Act, 49 U. S. C. 920 (b) (3); *Status of Wharfingers*, 251 I. C. C. 613, 616-617.

dispute. In their petition, appellees state that they "are engaged in arranging, in usual course of \* \* \* business, and as agents for others, for insurance, cartage, warehousing, and other services incidental to and including the affreightment of merchandise consigned to and from points within the United States, from and to points outside thereof; the services of [appellees] and their responsibilities to shippers in connection therewith being confined, in the ordinary course of business, to the terminal area \* \* \* [of the Port of New York], and [appellees] do not assume responsibility for delivery thereof at destinations" (R. 2). This summary of appellees' activities constitutes a precise description of the business of freight forwarding as normally understood by the courts. *Place v. Union Express Co.*, 2 Hilt. 19, 25 (N. Y.); *In re Emerson, Marlow & Co.*, 199 Fed. 95, 98 (C. C. A. 7). And the court below expressly found that appellees

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"A forwarder is one who, for a compensation, takes charge of goods entrusted or directed to him, and forwards them, that is, puts them on their way to their place of destination by the ordinary and usual means of conveyance" (2 Hilt. at 25).

In the *Emerson, Marlow* case, a definition of "forwarder" taken from the Century Dictionary is quoted with approval as follows (195 Fed. at 98):

"Specifically in the United States, one who ships or sends forward goods for others to their destination by the instrumentality of third persons. \* \* \* Neither a consignor shipping goods, nor a carrier engaged in transporting them is a forwarder. The name is applied strictly to one who

lees are "engaged in business \* \* \* as forwarders of freight 'in foreign commerce'" (R. 127).

That such forwarding of freight involves the handling of freight for shipment by common carriers by water is implicit throughout the record. The court below found that appellees, "forwarders of freight in foreign commerce" in the Port of New York area, arrange for the "affreightment of merchandise consigned to and from points within the United States from and to points outside thereof" (R. 128), and appellees' own evidence plainly shows that their activities precede or follow shipments through a "common carrier by water"\*\* (R. 39-48).

undertakes to see the goods of another put in the way of transportation without himself incurring the liability of a carrier to deliver them."

See also *Acme Fast Freight v. United States*, 30 F. Supp. 968 (S. D. N. Y.), affirmed *per curiam*, 309 U. S. 638; *Roberts v. Turner*, 12 Johns. 232 (N. Y.); *Lehigh Valley R. R. Co. v. United States*, 243 U. S. 444; *Highway Freight Co. v. Commission*, 108 Pa. Super 178, 164 Atl. 835; *Bush v. Miller*, 13 Barb. 481, 488 (N. Y.); *Schloss v. Wood*, 11 Colo. 287.

\* As noted in the Statement, *supra*, p. 4, the appellees, in response to an early questionnaire of the Commission, stated that they "carry on the business of forwarding in connection with common carriers by water in foreign commerce" (R. 5, 24). The court below held that this answer was in error (R. 123), but plainly this characterization referred only to the restrictive construction of the phrase, "in connection with," and not to the undenied fact that appellees' forwarding operations precede or follow the transshipment of goods by common carrier by water.

These facts would seem to call for the conclusion urged by the Government below, that the "business of forwarding" in which appellees are engaged is "in connection with a common carrier by water." The court below, however, ruled that statutory definition was not "intended to extend to \* \* \* independent forwarders \* \* \* who perform services solely for the shipper and at his expense and whose dealings with ~~the~~ carrier are limited to contracting for transportation at the carrier's established rates" (R. 124). The court thought that in order for a forwarder to be "engaged in the business of forwarding \* \* \* in connection with a common carrier by water," it must be "a corporation subsidiary to or otherwise affiliated with the carrier, or \* \* \* [one] to whom the carrier pays compensation as an inducement to ship by its line" (R. 123). We submit that such a restrictive reading of broad language in a remedial statute is wholly unwarranted.

## I

A NORMAL READING OF THE STATUTORY PHRASE  
"IN CONNECTION WITH" MAKES IT APPLICABLE  
HERE

As already stated, the forwarding activities of the appellees as a rule immediately precede or follow shipment by a "common carrier by water," within the meaning of the Shipping Act, and with

respect to all freight handled for export, appellees' operations culminate in the making of contracts of affreightment with the carrier (R. 40-41). Such forwarding activities are "if not an economic necessity, at least an economic convenience and advantage" in the movement of the freight from origin to destination (see Bunge, *Law of Draymen, Freight Forwarders and Warehousemen* (1915), p. 107). Indeed, a Congressional Committee, considering legislation affecting marine forwarders, more recently described them as "necessary and vital agencies in the promotion of an American merchant marine" and as "the necessary link between the supplier and the buyer."

H. Rep. No. 1682, 77th Cong., 2d Sess., p. 6. In every reasonable sense of the term, therefore, they would seem to be "connected with" the common carrier, as required by Section 1.<sup>9</sup> The actuality of the "connection" between appellees and the common carriers by water is apparent from the crucial facts that appellees' businesses exist only by reason of such carriers and require an intimate knowledge and constant utilization of carriers' rates, routes and schedules, and of the documentation and packaging necessary to render

<sup>9</sup> One meaning assigned by Webster to the term "to connect" (in its intransitive sense) is: "To meet or make connections for the transference of passengers, or change of means of communication" (New International Dictionary, 1916 and 1935).

freight transportable by such carriers.<sup>10</sup> These circumstances render the statutory language "in connection with" literally descriptive of appellees' day-to-day operations.<sup>11</sup>

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<sup>10</sup> See R. 54-55; compare sample billings R. 36: 37-38. In H. Rep. No. 1682, 77th Cong., 2d Sess., p. 6, recommending the adoption of a later enacted amendment (Act of March 14, 1942, 56 Stat. 171, 46 U. S. C. 1127) to the Merchant Marine Act of 1936, some of the functions which a forwarder might perform in the handling of lend-lease cargo are described as follows:

1. Tracing the goods to assure their prompt movement.
2. Checking the arrival at the seaboard and arranging for the transfer to the steamer either by truck, lighter, or otherwise.
3. Checking the physical handling of the goods in the railroad yards to assure the shipment moving complete on one or two or more lighters.
4. Checking, where necessary, the actual unloading of the lighter or the placing of the lighter alongside the steamer within the reach of the ship's tackles.
5. Arranging for diversion en route from the port originally consigned to some other designated port.
6. Correlating shipments from different suppliers so that the essential shipments may all go together on one steamer.
7. Checking condition of packages or merchandise, re-coopering, remarking, and so forth.
8. Performing whatever documentary work may be necessary to dovetail with any system set up by the American or British Governments.

<sup>11</sup> As the Commission has held, casual or isolated instances of warehousing or forwarding of freight for common carriage by water would not be subject to the jurisdiction of the Commission since "other persons" subject to the Act under Section 1 must be engaged in the "business" of forwarding or furnishing terminal facilities in connection with common carriage by water. *Rates and Practices of Maurice Benin (Shipping), Ltd. & Sigma Trading Corporation*, Docket No. 616 (1942), 2 U. S. M. C. 662.

Moreover, any possible doubt as to the meaning of the phrase in question must be resolved in the Commission's favor, in view of the familiar canons requiring liberal construction of a remedial statute and the ascription of normal meaning to statutory language. Manifestly, if these tenets of construction obtain, the holding of the court below that appellees' businesses are not carried on "in connection with" common carriers by water, is unsupportable. Cf. *Daneiger v. Cooley*, 248 U. S. 319, 327.

The view that the words "in connection with a common-carrier by water" are broadly descriptive instead of severely restrictive as held by the court below, finds support in the only known reported federal cases construing the coverage of the phrase "other persons" subject to the Act. In *California v. United States*, and *City of Oakland v. United States*, 320 U. S. 557, state and municipal wharfingers were held subject to regulation under the Act as "other persons \* \* \* furnishing \* \* \* terminal facilities in connection with a common carrier by water," notwithstanding that they possessed neither of the qualifications thought by the court below in the present case to be essential—corporate affiliation with the carrier or inducement through compensation to ship by the carrier. The court below sought to distinguish these cases, however, on the ground that the wharfage facilities were there

"furnished under some form of continuing contractual or other relationship with the common carrier by water" (R. 123). But while some such relationship may possibly have existed between the State wharfinger and the carriers, in *California v. United States*,<sup>12</sup> the same did not hold true in the companion case of *City of Oakland v. United States*. The record in the latter case established that, with the exception of a single pier assigned to a steamship line, the municipal wharves there regulated were operated as commercial wharfinger facilities, either directly by the municipality or on lease by independent operators. (Record in No. 22, October Term, 1943, vol. 1, pp. 170-173; 379-380.) In both the *California* and the *Oakland* cases, moreover, the wharfingers argued that their wharfage and terminal facilities were not furnished "in connection with a common carrier by water" for the reason that the services rendered in the operation thereof were performed as agents for consignees and not under agreements with carriers, and that the latter had no interest in such services. (Brief for State of California, pp. 122-126—No. 20, October Term, 1943; Brief for City of Oakland, pp. 102-106—

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<sup>12</sup>The facts there revealed were that: "Pier and office space is assigned by the [California] Board [of State Harbor Commissioners] to various steamship lines, and charges fixed by the Board are collected by these assignees for the Board" (320 U. S. at 579).

No. 22, same Term.) This Court summarily disposed of these contentions, stating (320 U. S. at 586):

And whatever may be the limitations implied by the phrase "in connection with a common carrier by water" which modifies the grant of jurisdiction over those furnishing "wharfage, dock, warehouse, or other terminal facilities," there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission.<sup>13</sup>

The application of the Act by this Court to independent wharfingers, as "other persons" subject

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<sup>13</sup> A similarly broad view of the phrase was taken by the Pennsylvania Supreme Court in *McNeely & Price Co. v. Philadelphia Piers, Inc.*, 329 Pa. 113. In that case, attempted state regulation of four wharfingers handling freight for transportation by water carriers was struck down on the grounds, *inter alia*, that the Federal Government had preempted the field by passage of the Act. Three of the wharfingers involved were owned by a railroad, the fourth appears to have been an independent operator; all four were held to be "other persons subject to the Act" as defined in Section 1. See 329 Pa. at 125-126. Compare the broad view taken by other courts of the scope of the phrase "in connection with" in other contexts. *Kokusai Kisen Kabushiki Kaisha v. Columbia S. Co.*, 23 F. Supp. 403, 405-406 (S. D. N. Y.) ("in connection with the operations to be carried out"); *Gurney v. Atlantic & Great Western Ry. Co.*, 58 N. Y. 358 ("services actually done in connection with that company's railways"); *People v. Liquorman*, 13 N. Y. Supp. (2d) 410, 171 Misc. 535 ("in connection with the restaurant business"); *Wallrabenstein v. Industrial Comm.*, 195 Wis. 15 ("in connection with such farm"); *Arnold Lumber Corp. v. Richardson*, 105 Fla. 204 ("in connection with any mill").

thereto, would seem to require its application to independent freight forwarders, whose "connection" with common carriers by water is essentially the same as that of the municipal wharfingers involved in the *City of Oakland* case.<sup>14</sup>

The only authority cited in support of the conclusion below—*Lehigh Valley R. R. Co. v. United States*, 243 U. S. 444—involved a different phrase ("connected with such [rail] transportation"), and related to a wholly different matter—the permissible allowances to shippers by carriers under the Interstate Commerce Act—and a wholly different purpose—the prevention of rebates in the guise of allowances for services.<sup>15</sup> Compare the broad construction given the phrase "in connec-

<sup>14</sup> The dissent in that case disagreed with the majority only upon the question whether the powers entrusted to the Commission to regulate "unjust practices" included the power to prescribe minimum free-time for wharf storage. The dissent apparently recognized that Congress intended to include municipal wharfingers within the definition of "other person" in Section 1. See 320 U. S. 589.

<sup>15</sup> *Lehigh Valley R. R. Co. v. United States*, 243 U. S. 444, arose under Section 15 (13) of the Interstate Commerce Act, providing for "just and reasonable" allowances to shippers for services performed by them "in connection with such [rail] transportation." The question presented was whether certain services rendered to a railroad by a forwarder in maintaining offices, advertising the railroad and soliciting traffic for it, were services for which allowances were permitted by Section 15 (13). This Court cited the well recognized Congressional intent (*Interstate Commerce Commission v. Difffenbaugh*, 222 U. S. 42, 46-47; *Union Pacific R. R. Co. v. Updike Grain Co.*, 222 U. S. 215; 218-219; *United*

tion with the transportation" of liquor, as found in Section 239 of the Criminal Code (18 U. S. C. 389), in *Danciger v. Cootev*, 248 U. S. 319, 327-328.

## II

NOTHING IN THE LEGISLATIVE HISTORY JUSTIFIES DISREGARDING THE NORMAL MEANING OF THE PHRASE "IN CONNECTION WITH A COMMON CARRIER BY WATER".

Although the legislative history nowhere precisely reaches the point here at issue, it is, we submit, indicative solely of an intention to confine the auxiliary field of coverage ("other person[s] \* \* \* not included in the term 'common carrier by water'") to that related to the primary field of regulation ("common carriers by water" as defined by the Act). There is no hint in the legislative materials of any intention to create an artificial dichotomy within the field

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*States v. Baltimore & Ohio R. R. Co.*, 231 U. S. 274, 293; *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402, 406-408; *American Sugar Refining Co. v. Del. L. & W. R. R. Co.*, 207 Fed. 733, 737 (C. C. A. 3); *General Electric Co. v. New York Central & H. R. R. Co.*, 14 I. C. C. 237, 242) that the shipper should receive an allowance if, but only if, he performed a part of the actual transportation which the carrier was obligated to furnish, as set forth in Section 1 (3) of the Interstate Commerce Act, and which is susceptible of a charge under rail tariffs if allowance not be made. The Court held that the forwarder's services, "although in a practical sense 'connected with such [rail] transportation', were not connected with it as a necessary part of the carriage--were not 'transportation service'" (243 U. S. at 446-447).

of marine forwarders dependent upon some loosely defined concept of affiliation having no relationship to the objectives of the Act.

In the predecessor bill (H. R. 14337, 64th Cong.) to that which became the Act (H. R. 15455, 64th Cong.), the coverage of auxiliary services was provided for as follows:

The term "other person subject to this act" means any person not included in the term "common carrier by water" and carrying on the business of forwarding, ferrying, towing, or furnishing transfer, lighterage, dock, warehouse, or other terminal facilities in or in connection with the foreign or interstate commerce of the United States.

Obviously, this definition was inexact; if taken literally, it would include forwarders and terminal facilities operating in connection with rail shipments. The definition arrived at in the subsequent bill, H. R. 15455 which became the Act,<sup>16</sup>

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<sup>16</sup> As originally submitted, H. R. 15455 included ferrying, towing, transfer and lighterage concerns as well as those businesses now covered in the Act's definition of "other persons." Amendments to the bill on the floor of Congress, however, eliminated these services from coverage (53 Cong. Rec. 12804). It may be noted that the original inclusion of transfer and lighterage companies was apparently in response to the recommendations of the House Investigating Committee (which gave impetus to the entire legislation; see House Report No. 659, 64th Cong., 1st Sess., p. 27) that: \*\*\* there should be legislation providing for equal treatment to all shippers and water carriers by transfer and

avoided these difficulties and, we believe, achieved its objective of including persons operating in terminal areas, and handling the freight or furnishing other related services or facilities immediately prior to its shipment by, or upon its receipt from, common carriers by water as defined in the Act. *California v. United States, supra*; cf. *McNeely & Price Co. v. Philadelphia Piers, supra*, n. 13. The requirement that the business of forwarding be carried on "in connection with a common carrier by water" is thus fully explained by the necessity of excluding forwarders whose business relates to commerce not regulated by the Act, such as rail or truck shipments. There is nothing in the House or Senate hearings on the two bills,<sup>17</sup> which were identically sponsored, in the Committee Reports on the legislation,<sup>18</sup> or in the debates, to indicate a more restrictive intent.

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lighterage concerns when forming a link in interstate or foreign commerce" (*id.* at 32). Although there exists no comparable statement concerning forwarding or terminal activities, it is at least inferable that the recommendation constitutes a definition of the intended scope of the present coverage since the terms "transfer" and "lighterage" were similarly modified in the bill as originally submitted by the words "in connection with a common carrier by water."

<sup>17</sup> Hearings on H. R. 14537 before the House Committee on the Merchant Marine and Fisheries (64th Cong., 1st Sess.); Hearings on H. R. 15455 before the Senate Subcommittee on Commerce (64th Cong., 1st Sess.).

<sup>18</sup> House Report No. 659, 64th Cong., 1st Sess.; Senate Report No. 689, 64th Cong., 1st Sess.

## III

THE PURPOSES OF THE ACT ARE AS FULLY APPLICABLE TO INDEPENDENT FREIGHT FORWARDERS AS TO THOSE AFFILIATED WITH OR CONTRACTUALLY RELATED TO A COMMON CARRIER BY WATER

The Act, in at least three Sections, subjects "other persons," as well as common carriers, to broad prohibitions against practices deemed detrimental to shippers, carriers or "other persons" subject to the Act. Nothing in these provisions affords any ground for the contention that Congress had in mind only those forwarders or operators of terminal facilities who are affiliated or contractually connected with a common carrier in the manner suggested by the court below. (See *supra*, p. 16.)

Section 15 of the Act (Appendix, *infra*, pp. 36-38) requires every common carrier by water and every "other person subject to" the Act to file with the Commission a copy of every agreement with another carrier or other person subject to the Act

\* \* \* giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic;  
\* \* \* limiting or regulating in any way the volume or character of freight \* \* \* traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. \* \* \*

The Commission is then authorized to disapprove, cancel, or modify any agreement

\* \* \* that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers \* \* \* or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act \* \* \*

Further, Section 17 of the Act (**Appendix, infra**, pp. 39-40) directs every common carrier by water in foreign commerce "and every other person subject to" the Act to

\* \* \* establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. \* \* \*

Finally, Section 20 (**Appendix, infra**, pp. 41-42) makes it unlawful

\* \* \* for any common carrier by water or other person subject to this Act \* \* \* knowingly to disclose to \* \* \* any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier or other person subject to this Act for transportation in interstate or foreign commerce, which information may be used to the detri-

ment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor, or which may be used to the detriment or prejudice of any carrier \* \* \*.

Manifestly, the evils against which these prohibitions and mandates are directed would be equally harmful to the interests sought to be protected whether engaged in by "independent" forwarders and terminal operators or by those affiliated with or compensated by carriers. Notwithstanding the absence of such affiliated or compensated relationship, the disregard of these mandates can inflict damage upon shippers (as by discrimination between them) or upon consignees (as by the disclosure of confidential shipping information) by those engaged in the business of forwarding marine freight or of furnishing wharfage, dock, warehouse or other terminal facilities at shipside. As this Court noted in the course of its decision in *California v. United States*, 320 U. S. at 586, the legislative history of the Act discloses a specific intention to reach public as well as private operators of terminal facilities. In response to a question asked on the floor of Congress whether it was intended by the bill to deprive municipalities of control over city-owned terminal facilities, Congressman Alexander, Chairman of the House Committee on the Merchant Marine and Fisheries and manager of the bill, replied (53 Cong. Rec. 8276):

Not at all; only to prevent unjust discrimination between shippers. If they do

exercise such discrimination, there is no reason why they should not be amenable to law as well as a private person.

As shown in the consideration of the *California* and *City of Oakland* cases, discrimination may be, and was there, practiced by "independent" wharfingers. Equally, it is submitted, improper practices may occur in the operation of the other auxiliary services specifically named in the Act's definition of "other persons" (Appendix, *infra*, pp. 35-36) where such services constitute a closely related link in the transhipment of goods by water.

The court below conceded that "regulation of the forwarder is an appropriate and perhaps necessary means of preventing discrimination" between shippers, where the forwarder is affiliated with the carrier or is paid "compensation as an inducement to ship by its line" (R. 123). But certainly the practices of independent forwarders may equally constitute unjust or unreasonable "regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property" (see R. 82-83, 90-91, 108) proscribed in Section 17.<sup>19</sup> It may in fact be strongly argued that regulation of independent facilities is more "appropriate" and "necessary"

<sup>19</sup> The Commission's general investigation of Port of New York forwarders was launched following receipt of a complaint that a forwarder's billing made it impossible to determine what part of its total charge represented out-of-pocket expenses in obtaining the necessary drayage, documentation, etc., and what part represented service charges (R. 11, 33, 72, 76, 82, 103).

(R. 123) than where such facilities are operated in continual contractual arrangements with common carriers by water, for the Commission may strike at such arrangements, if utilized for the purposes of discrimination, directly through the carrier, and has done so in at least one case.<sup>20</sup> The necessity of regulating independent facilities as "other persons subject to the Act" has uniformly been recognized by the Commission.<sup>21</sup>

If not covered by the Shipping Act, appellees would not otherwise be subject to federal regulation because Part IV of the Interstate Commerce Act (49 U. S. C. Supp. IV, 1002 *et seq.*) does not apply to forwarders unless, *inter alia*, they assume responsibility for transportation from point of receipt to point of destination and unless they,

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<sup>20</sup> *In re Lawfulness of Payments to Shippers by Wisconsin & Michigan Steamship Co. through Automotive Dealers' Transport Co.*, Docket No. 457 (1938), 1 U. S. M. C. 744. Although the proceedings in this case later became moot because of the dissolution of the latter company by means of which discrimination was practiced, its significance lies in the fact that the Commission commenced its action directly against the carrier.

<sup>21</sup> *Long Beach Lumber Co., Inc. v. Consolidated Lumber Co.*, Docket No. 604 (1941), 2 U. S. M. C. 611 (charges of discrimination against public lumber wharf operator dismissed after hearing on merits); *Interchange of Freight at Boston Terminals*, Docket No. 617 (1942), 2 U. S. M. C. 671 (unreasonable practices by wharfage concern ordered terminated, no issue as to jurisdiction raised); *In the Matter of Services, Charges, and Practices of Carriers Engaged in the Eastbound Transportation of Lumber and Related Articles by way of the Panama Canal*, Docket No. 418 (1939), 2 U. S. M. C. 143 (investigation of both carriers and terminals participating in or connected with lumber transportation).

in the ordinary and usual course of their undertaking, assemble and consolidate or provide for assembling and consolidating shipments (see Appendix, *infra*, pp. 43-44). Appellees fall within neither class (see Statement, *supra*, pp. 6-7; R. 122, 40-41).

Finally, it may be noted that when Congress has wished to include only affiliates of transportation companies which are engaged in auxiliary transportation services, it has not encountered difficulty in framing specific language for this purpose. See Section 1 (First) of the Railway Labor Act (44 Stat. 577, 45 U. S. C. 151); Railroad Unemployment Insurance Act, Section 1 (a) (52 Stat. 1094, 45 U. S. C. 351); Carriers Taxing Act of 1937, Section 1 (a) (50 Stat. 435, 45 U. S. C. 261). The *California* and *City of Oakland* cases, moreover, demonstrate that coverage extends beyond carrier affiliates. It seems an obvious over-refinement to suppose that the requirement that "every other person subject to the Act shall establish \* \* \* just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property" (Sec. 17, *supra*, p. 27) was meant to extend otherwise only to forwarders who receive compensation from a carrier for shipping by its line.

The decision below not only ignores these considerations, but results in rendering almost superfluous the extension of the Act to other persons. According to the court below, the phrase "in con-

nnection with a common carrier by water" was meant to embrace affiliated forwarders and such other forwarders "to whom the carrier pays compensation as an inducement to ship by its line, as in *Lehigh Valley R. Co. v. United States*, 243 U. S. 444, \* \* \*'" (R. 123).<sup>22</sup> But the relationship between the forwarder and the carrier in that case was obviously one of agency (see n. 15, *supra*), and where there is an affiliation or compensated contractual relationship, an agency may frequently if not invariably be established. If an agency relationship is a requisite to jurisdiction, the reference to forwarders in the Act's

<sup>22</sup> The court below later in its opinion characterized the services in the *Lehigh* case as "of the same character as those rendered by the present plaintiffs," noting, however, that such services were held not to meet the requisites of Section 15 (13) of the Interstate Commerce Act (R. 124).

Although we believe coverage of marine forwarders under the Act should not turn on the fact of a compensated relationship, it may be noted that appellees would seem to fulfil even this requirement. Based upon the record (R. 108-117), the court below found (R. 125) that each appellee "receives a commission or brokerage fee from the carrier with respect to shipments for which he acts as forwarder" and "collects forwarding fees from the shipper on the same shipment on which it collects brokerage from the carrier." This circumstance in itself is a potent inducement to discrimination, since the brokerage on large shipments may cause the free performance of forwarding services thereon to the prejudice of small shippers. Cf. *California v. United States*, *supra*; and see the answer of one appellee to the question: "Do you collect a commission or brokerage fee from the carrier and forwarding fees from the shipper on the same shipment?" (R. 108, 137). "Yes, brokerage on average shipment would not be sufficient to enable us to handle shipment" (R. 114).

definition of "other persons" as those "not included in the term 'common carrier by water'" accomplished nothing, for the Commission's established power to prevent discrimination by carriers (see, e. g., *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297) would manifestly extend to its agents.<sup>23</sup>

#### CONCLUSION

For the reasons above stated, it is respectfully submitted that the decision of the court below should be reversed.

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SEPTEMBER 1945.

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23 By Section 20 of the Act it is declared "unlawful for any common carrier by water or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee of such carrier or person . . . knowingly to disclose" facts as to any shipment which may be used to the detriment of the shipper." Again, if the relationship contemplated by the definition of "other persons" is one of agency with a carrier, the reference to "other persons" in Section 20 was superfluous since they would be embraced in the prohibition as agents of carriers.

## APPENDIX

The Shipping Act of 1916, as amended (39 Stat. 728, 46 U. S. C. 801 *et seq.*), provides in part as follows:

### Section 1 (46 U. S. C. 801):

When used in this Act:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes, on regular routes, from port to port.

The term "other person subject to this Act" means any person not included in the

term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

The term "vessel" includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

The term "documented under the laws of the United States," means registered, enrolled, or licensed under the laws of the United States."

#### Section 15 (46 U. S. C. 814):

Every common carrier by water, or other person subject to this Act, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way

the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission.

All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments

and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes" and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of \$1,000 for each day such violation continues, to be recovered by the United States in a civil action.

**Section 16 (46 U. S. C. 815):**

It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classifications, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent theréof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty ~~on~~ of a misdemeanor punishable by a fine of not more than \$5,000 for each offense.

#### Section 17 (46 U. S. C. 816):

No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the commission finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing,

or delivering of property. Whenever the commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

**Section 18 (46 U.S.C. 817):**

Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the commission and keep open to public inspection, in the form and manner and within the time prescribed by the commission, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the commission and after ten days' public notice in the form and manner prescribed by the commission, stating the increase proposed

to be made; but the commission for good cause shown may waive such notice.

Whenever the commission finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

Section 20 (46 U. S. C. 819):

It shall be unlawful for any common carrier by water or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee of such carrier or person, or for any other person authorized by such carrier or person to receive information, knowingly to disclose to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier or other person subject to this Act for transportation in interstate or foreign commerce, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor, or which may be used to the detriment or prejudice of any carrier; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used.

Nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or

to any officer or agent of the Government of the United States, or of any State, Territory, District, or possession thereof, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime, or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

Section 21 (46 U. S. C. 820):

The commission may require any common carrier by water, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the Commission so requires, and shall be furnished in the form and within the time prescribed by the commission. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of \$100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than \$1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

**Section 22 (46 U. S. C. 821):**

Any person may file with the commission a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The commission shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the commission, satisfy the complaint or answer it in writing. If the complaint is not satisfied the commission shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The commission, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The commission, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.

**Section 31 (46 U. S. C. 830):**

That the venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the commission shall, except as herein otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

Part IV of the Interstate Commerce Act, 56 Stat. 284, provides in part as follows:

Section 402 (49 U. S. C. Supp. IV 1002):

(a) For the purposes of this part—

\* \* \* \* \*

(5) The term "freight forwarder" means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act.

\* \* \* \* \*

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No. 44.

OCT 5 1945

CHARLES ELMORE DROPLEY  
CLERK

IN THE

**Supreme Court of the United States**

October Term, 1945.

UNITED STATES OF AMERICA,

*Appellant,*

v.

AMERICAN UNION TRANSPORT, INC., D. C.  
ANDREWS & CO., INC., ATLANTIC FORWARD-  
ING CO., INC., *et al.*,

*Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE SOUTHERN DIS-  
TRICT OF NEW YORK.

---

**BRIEF FOR THE APPELLEES.**

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HAROLD L. ALLEN,  
*Attorney for Appellees.*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1945.

No. 44.

UNITED STATES OF AMERICA,  
*Appellant,*

v.

AMERICAN UNION TRANSPORT, INC.,  
D. C. ANDREWS & CO., INC., AT-  
LANTIC FORWARDING CO., INC.,  
*et al.,*  
*Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF FOR THE APPELLEES.**

**Opinions Below.**

The opinion of the District Court on motion for interlocutory injunction by plaintiffs and for summary judgment by defendant is reported in 55 F. Supp. 682; opinion on reargument is reported in 55 F. Supp. 682; opinion on final judgment has not been reported.

**Jurisdiction.**

The judgment of the District Court was entered on November 30, 1944. Petition for appeal was filed and appeal was allowed January 27, 1945. Probable jurisdiction was noted April 2, 1945. The jurisdiction of this Court rests on Section 31 of the Shipping Act of 1916 (39 Stat. 728;

46 U. S. Code §30), the Urgent Deficiencies Act of 1913 (38 Stat. 220; 28 U. S. Code 47a), and Section 238 of the Judicial Code (43 Stat. 938; 28 U. S. Code 345).

### **Statute Involved.**

The statute involved is the Shipping Act of 1916 (39 Stat. 729, 46 U. S. Code 801, *et seq.*) and set forth in the Appendix hereto.

### **Questions Presented.**

The question of the jurisdiction of the Maritime Commission over non-carrier connected forwarders as "other persons subject to this (the Shipping) Act" (1916) is here for the first time. The questions presented by the appeal are:

- (a) Did the procedure of the Commission in issuing its order of August 21, 1942, conform to the requirements of due process of law, particularly with relation to notice, hearing, and the basic prerequisites of proof?
- (b) What is meant by the statutory phrase "carrying on the business of forwarding in connection with a common carrier by water?"
- (c) Did the procedure of the Commission antecedent to the order of May 18, 1943, conform to the basic requirements of due process of law, hearing, and proof; and was there any warrant in the whole record or reasonable basis in the law, for concluding that the Commission had jurisdiction of the appellees?

### **Statement.**

This action challenges the validity of two orders of the Maritime Commission asserting jurisdiction for the first time since 1916 (R. 49) over a class of merchants operat-

ing as shippers' agents and described as freight forwarders.

The first order dated August 21, 1942, issued *ex parte*, made a definitive finding of jurisdiction over plaintiffs, and directed an investigation. The second orders of January 14th and May 18, 1943, directed the plaintiffs, as persons so subject to the Commission's jurisdiction under Section 21 of the Act (46 U. S. Code 820) to answer certain questions under penalty of a fine of \$100 per day. The circumstances under which these orders were issued are:

On April 30, 1942, the Maritime Commission received a letter from the Angier Chemical Company, complaining that Foreign Freight Forwarders, Inc., now defunct, and not a party hereto, had overcharged it. The complaint was informally investigated by the Commission, and the complainant advised (R. 72) that "his remedy against the forwarder is \*\*\* an action on contract." That complaint was made the subject of a memorandum (R. 72) to the Commission by its Director of Regulation, recommending a general investigation and attaching a proposed order (R. 67) which the Commission executed on August 21, 1942, (R. 11). It was an entirely *ex parte* order and recites in part (R. 11):

"It appearing, That each of the persons named in Appendix A herein carry on the business of forwarding in foreign commerce and that each of them is an other person subject to this Act within the meaning of that term as used in sections 1 and 17 of the Shipping Act, 1916, as amended;"

The statutory test of jurisdiction is whether the forwarding is "in connection with a common carrier by water."

It ordered a general inquiry (R. 12) " \* \* \* concerning the lawfulness of the rules, regulations, practices, and

operations of said forwarders \* \* \*. There was no statement therein that "carrier connection", a prerequisite of jurisdiction, was to be a subject of inquiry.

The scope of the inquiry was stated in a letter from the Director of Regulations to the Imperial Forwarding Company (R. 43, 49), stating that the inquiry was "for the purpose of developing facts upon the basis of which the Commission can formulate a sound regulatory policy \* \* \*." The power to regulate was taken for granted.

The Commission had before it four letterheads of plaintiffs (R. 32) "to substantiate the contention of the Government that the plaintiffs carry on the business of forwarding in connection with a common carrier by water as defined in the Act, \* \* \*." The Director of Regulations later explained the grounds for the Commission's jurisdictional finding by stating (R. 83) " \* \* \* you can't be in my job very long without getting a great deal of gossip and rumor going around, and I knew I had heard a great deal of gossip and rumor in connection with the practices of some of the forwarders."

In the fall of 1942, after the issuance of the initial order and before any hearings were had, the Commission sent to all the respondents (R. 31) named therein (including the appellees) an informal questionnaire (R. 136) which contained the following question (R. 32, 136):

"Do you carry on the business of forwarding in connection with common carriers by water in foreign commerce?"

and received affirmative answers.

It propounded another question, numbered 32 (R. 137):

"33. Is your company owned or controlled by or affiliated with any shippers for whom you act as

forwarder or with any common carrier? If so, explain."

The answers as to carrier connection were negative.<sup>1</sup> The affirmative answers to the first of the above questions were made by laymen, without understanding the legal conclusions which might be based thereon, and in the belief that such answers would result in the receipt of lend-lease forwarding business then being assigned by the War Shipping Administration—a Maritime Commission associated agency. The Court below found (R. 129) that the evidence before it and before the Commission contradicted the admission made by plaintiffs, and that such admissions were erroneous.

On December 9th and 10, 1942, hearings were held by the Commission at New York. No subpoenas were issued to plaintiffs, nor were they requested to attend and give testimony as to their carrier connections. At the conclusion of the second day's hearing, counsel for the Commission *sua sponte* moved an adjournment without date. The hearing was not resumed.

At the hearing, the Commission produced one witness, Mr. Harold C. Dow, an employe of the War Shipping Administration, who testified (R. 53-63) concerning the nature and character of the plaintiffs' business.<sup>2</sup> His testimony did not, as the District Court indicated (R. 122) differ from the description of such business made by Mr. Herbert A. Byrne (R. 39-40), on behalf of the plaintiffs in the court below.

The substance of Mr. Dow's testimony was that appellants are (R. 55) "a sort of representative of the exporter or shipper" and performed what "the shipper would or-

1. The negative answers appearing in the original questionnaires offered in evidence (R. 53) are included in the papers upon which judgment below was rendered (R. 117-118); specified in the praecipe for transcript of record (R. 134); but not printed here.

2. This testimony is printed in note 9, *post*.

dinarily have to perform in order to see that the goods arrive at destination."

Thereafter, on January 14, 1943, the Commission entered a second order (R. 19) under the provisions of Section 21 of the Shipping Act (46 U. S. Code 820), directing the plaintiffs, as persons subject to its jurisdiction, to answer numerous questions within thirty days, under penalty of being fined \$100 a day each for each day of default. This action was then brought, in which the Commission's power, on the record as a whole, to issue either of said orders was challenged.

On May 18, 1943, the Commission vacated its order of January 14th, and entered a new order (R. 27)<sup>3</sup> which modified the previous questionnaire and again required answers within thirty days under identical penalties. It recited that the information sought (R. 28):

"is necessary to the proper administration of the regulatory provisions of the Shipping Act, 1916  
 \* \* \*"

No inquiry into the jurisdictional fact of carrier connection was indicated. The validity of that order was submitted to the Court below by consent (R. 128) after being annexed to defendant's answer.

The District Court denied defendant's motion for summary judgment (R. 124), denied plaintiffs' motion to set aside the order of August 21, 1942, and granted a temporary injunction against the order of May 18, 1943.

Motion for reargument by defendant was denied (R. 124-126).

The Commission having no further evidence to submit to the District Court, the cause was, by stipulation, submitted and argued (R. 117) on the same evidence which was before the Court on the preliminary motions.

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3. The original order did not bear the approval of the Director of the Budget, as required by the Federal Reports Act of 1942 (56 Stat. 1079; 5 U. S. Code 139c). The new order of May 18, 1943 bore such approval.

Final judgment set aside the order of May 18, 1943, but declined to disturb the order of August 21, 1942 (R. 130).

### **Summary of Argument.**

#### **I.**

The appellees argue that the initial determination of their status as persons subject to the jurisdiction of the Maritime Commission, contained in the order of August 21, 1942, was an entirely *ex parte* determination and was wanting in due process of law. There was no evidence of any "carrier connection" of any appellee before the Maritime Commission when it made its determination of the appellees' status, and thus there was no warrant in the record or reasonable basis in the law for the Commission to conclude it had jurisdiction. The initial determination was not reviewable when made but became reviewable when the Commission, by subsequent administrative action, issued orders, the disobedience of which subjected appellees to penalties.

#### **II.**

The appellees are not engaged in "the business of forwarding in connection with a common carrier by water," since none of them has any relationship of any kind, contractual or otherwise, with any such carrier; nor do they render any transportation-connected or accessorial services for such carriers to induce any movement of traffic over carriers' lines. The appellees are shippers or the agents of shippers and Congress did not intend to regulate them.

### III.

On the whole record before the Commission, after its abortive hearings of December 9th and 10, 1942, there was no evidence upon which it could conclude it had jurisdiction of appellees and its order of May 18, 1943 is void for want of power to issue it. Moreover, there was no fair hearing accorded appellees and the order is void for want of due process of law.

### I.

**The determination of appellees' status by the order of August 21, 1942 should be set aside.**

The Court below improperly denied respondents' plea to set aside the order of August 21, 1942. While that order is in the nature of a mere notice of hearing within the doctrine of *United States v. Illinois Central R. R. Co.* (1917), 244 U. S. 82, 89, and *United States v. Los Angeles & S. L. R. R. Co.* (1927), 273 U. S. 299, 309, it is also an administrative finding or conclusion of law that the Commission has jurisdiction of respondents, made without notice or hearing, and based upon no evidence or facts before the Commission establishing that respondents are engaged in forwarding "in connection with a common carrier by water" within the meaning of 46 U. S. Code 801—a fact prerequisite to such jurisdiction. It is thus void for want of due process of law under the authority of *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 73, 74; *United States v. Abilene and S. Ry. Co.* (1924) 265 U. S. 274, 286-290; *Interstate Commerce Commission v. Louisville & N. R.R. Co.*, 227 U. S. 88, 91, 92. Moreover, no findings of fact of a "carrier connection" of respondents were made to support the legal conclusion (*State of Florida v. United States* [1931] 282 U. S. 194, 212, 215)—such finding would seem to be required by Sec<sup>t</sup>

tion 23 of the Shipping Act (1916) (46 U. S. Code 822); and there was not only no substantial evidence before the Commission, but no evidence whatever, and accordingly no warrant in the record or reasonable basis in the law for the Commission to conclude it had jurisdiction (*National Labor Relations Board v. Hearst Publications, Inc.* [1944], 322 U. S. 111, at 131; *The New England Division* case [1923] 261 U. S. 184, 203; *The Chicago Junction* case [1924], 264 U. S. 258, 265-266).

As to the factual basis of the Commission's *ex parte* determination of the appellees' status as persons subject to the Act, it is patent that the persons named as respondents in the August 21, 1942 order, were selected either from the classified telephone directory or by some other equally random procedure. Many so named were dead and some out of business (R. 16) and the Commission added and eliminated names of persons alleged to be subject to its jurisdiction at its caprice (R. 16, 17, 18).<sup>5</sup>

Had the order of August 21, 1942 been challenged when issued and before the Commission brought respondents within the ambit of regulation by the orders of January 14th and May 18, 1943, this Court would probably decline to review it. *Rochester Telephone Corp. v. United States* (1939), 307 U. S. 125, 130; *United States v. Illinois Central R. R. Co.*, 244 F. S. 82, 89, since its operation was then contingent upon future administrative action; re-

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4. The section reads in part:

"Orders of the Commission relating to any violation of this chapter shall be made only after full hearing, and upon a sworn-complaint or in proceedings instituted of its own motion."

5. The *ex parte* recitals in the supplemental orders First, Second, and Third are (R. 16, 17):

"It appearing further, That, due to recent discontinuances in business, changes in names, and for other reasons, certain respondents named in the Commission's order of August 21, 1942, are no longer in fact responsive as respondents in this proceeding concerned;"

spondents were not constrained thereby; and it was an interim step in the proceeding.

When, however, subsequent administrative action was taken and the orders of January 14th and May 18, 1943, were issued, the initial order of August, 1942, ceased to be a mere abstract declaration of the respondents' status—penalties for disobedience were imposed<sup>6</sup>—and it became an integral part of a scheme of positive regulation.

Under such circumstances, this Court did not hesitate to review the initial determination of jurisdiction in either *Shields v. Utah Idaho Central R. R. Co.* (1938), 305 U. S. 177, or *Rochester Telephone Corp. v. United States*, 307 U. S. 125.

In the *Shields* case, the initial determination of the Interstate Commerce Commission, that the carrier was not an interurban electric railway within the meaning of the Railway Labor Act (45 U. S. Code 151, *et seq.*) was clearly not subject to review when made. When, however, the mediation board directed the posting of notices, the disobedience to which entailed criminal penalties, and the railroad sued to enjoin prosecution, this Court reviewed the entire record for the purpose of ascertaining at least (p. 185) "whether the Commission had acted within its authority" (p. 182) whether the hearing held conformed to the requirements of due process of law, and (p. 185) "whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. *Id.* That question,"

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6. Section 21 of the Shipping Act (1916) (46 U. S. Code 820) provides in part:

"The Commission may require any common carrier by water, or other person subject to this chapter, \*\*\* to file with it any periodical or special report \*\*\* appertaining to the business of such carrier or other person subject to this chapter. \*\*\* Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of \$100 for each day of such default. \*\*\*"

said the Court "must be determined upon the evidence produced before the Commission."

We suggest that this Court here accord the same character and scope of review to the Commission's order of August 21, 1942, and since it was made *ex parte*, without notice or hearing, or evidence or argument, and without any attempt to comply with the requirements of due process of law, or intent to ascertain the fundamental fact of appellees' carrier connections, that it be set aside as arbitrary and capricious.

In the *Rochester Telephone* case, *supra*, this Court, once it became clear that the determination of the corporation's status by the Communications Commission (p. 144) "carried direction of obedience to previously formulated mandatory orders" reviewed the proceedings in which the jurisdictional status was determined. The scope of the review is narrow, it is true, but it comprehends all that we ask to have reviewed here, that is to say:

" \* \* \* questions affecting constitutional power, statutory authority and the basic prerequisites of proof \* \* \*<sup>7</sup>

Since all these are lacking here, the predicate of action by the Commission is wanting and the order of August 21, 1942 must fall. Errors of law, substantive or procedural, are sufficient to invalidate an administrative act. *Interstate Commerce Commission v. Union Pacific R. R. Co.* (1912), 222 U. S. 541, 547; *Skinner & Eddy Corp. v. United States* (1919), 249 U. S. 557, 562.

Whether or not the Commission shall proceed anew in a correct manner is a question not now before this Court, but it is clear that in such proceeding, it should be limited to inquiries concerning the facts of appellees' "carrier connection", i. e., it should establish a solid basis of ju-

<sup>7</sup>. The Court prescribed these limitations to the scope of the review, 307 U. S. at p. 140.

risdiction before proceeding to issue regulatory orders. On this phase of the discussion, however, it will be noted, as we see in Point II hereof, that the Commission has nothing further to offer on this subject. By its stipulation (R. 117) for final judgment on the same record on which the District Court decided the preliminary motions, the Commission admits the "independent" character of appellees, and that as to their "carrier connection", there are no further facts to be elicited.

However, irrespective of what may be done *in futuro*, we assert now that the order of August 21, 1942, is void for want of procedural due process of law, and that it should be set aside.

## II.

**The appellees are not "other persons subject to the Act" and there was no evidence before the Commission to establish that they were.**

The Commission has jurisdiction to compel the appellees to file reports under Section 21 of the Act (46 U. S. Code 820) only if they are other persons subject to the Act; and they are such other persons only if engaged in "forwarding \* \* \* in connection with a common carrier by water." It is clear that there was no evidence of this fact before the Commission to support its ultimate conclusion of jurisdiction when the order of August 21, 1942 was made. It remains to be seen whether on the whole record before it, after the abortive hearings of December 9th and 10, 1942, there was any such evidence upon which it could legally issue the order of May 18, 1943, to which appellees were required to respond. We must first consider what the statute means by the term "business of forwarding in connection with a common carrier by water."

At the outset of this point it should be observed that there are various categories of persons known as freight

forwarders. These are described in a recent report of the House Committee on Merchant Marine and Fisheries.<sup>8</sup> Generally, such forwarders as here act solely as agents of the shipper in the terminal areas at the Port of New York (R. 40) and have no "connection" of any sort with carriers other than those arising out of the contract of affreightment expressed in the bill of lading, taken on behalf of and in the name of the shippers, their principals, and no responsibility for carriage of merchandise.

The forwarding services of these appellees are not to be confused as analogous in foreign commerce to the type of domestic forwarding brought under regulation by Part IV of the Interstate Commerce Act (56 Stat. 284; 49 U. S. Code 1001, *et seq.*), where the so-called "forwarders" are common carriers. Even there, however, Congress excluded by definition domestic persons whose services, as in the case of appellees, "are confined to the terminal area in which such operations are performed" (49 U. S. Code 1002-[c] [2]).

This was alleged in the complaint (R. 2), the testimony of the Commission's sole witness, Harold C. Dow (R.

8. (House Report No. 1682, 77th Cong., 2nd Session):

"It was clear to the committee that the work of freight forwarding is essential to the movement of goods in foreign commerce under normal conditions. Large steamship companies maintain their own forwarding organizations. Manufacturers and suppliers with a large export business maintain forwarding facilities within their organizations. Exporters and importers without their own forwarding facilities usually make use of the facilities of steamship companies. But a large number of transactions involving smaller consignments are handled by independent foreign freight forwarders and custom house brokers. The existence of these groups protects the public from combinations and preferences that might follow if the only forwarding organizations were to be found with the steamship companies. In general, it may be said that these forwarders render administrative services such as routing arrangements and the preparation of documents, and they supply brokerage services predicated upon the development of export business and the furnishing of cargo for steamship companies.

The freight forwarders and licensed custom brokers, in the opinion of your committee, are necessary and vital agencies in the promotion of an American merchant marine, to such an extent that if they should be eliminated and the business formerly done by them should be done only by the representatives of their competitors, the future of the American merchant marine in the post-emergency period will be precarious in the extreme. \* \* \*

54-55),<sup>8</sup> affirmed by the affidavit of Herbert A. Byrnes (R. 39-41), and is consistent with judicial definition of the term "forwarder" (*Place v. Union Express Co.*, 2 Barb. 19, 25 [New York, 1858]; *In re Emerson, Marlow & Co.*, 199 Fed. 95, 98 [C. C. A. 7th] [1912]).

9. *By the Commission's Counsel:*

"Q. Would you be good enough to detail for us, if you will, briefly, the general nature of the freight forwarding business; foreign freight forwarding business? A. Well, the foreign freight forwarding business has been in existence for approximately 100 years, and is an export shipping medium that is used by almost all export shippers. And the forwarders maintain offices at all ports, and their duties are arranging the necessary space with the steamship companies, and obtaining permit for the acceptances of the freight at piers, and from time to time it is necessary for the forwarder to arrange suitable storage space for the shipment until the steamers are available, or for other causes. Also the forwarder is obligated to check the marks on shipping papers and containers to be certain that they are in accordance with the regulations prescribed by the country to which the shipment is destined.

Also, if the containers are damaged, the forwarder sees that they are recovered. If the material in the containers is found to be damaged en route to seaboard, the forwarder notifies the insurance company so that an inspection may be made to ascertain the extent of the damage. A forwarder must attend to the procurement when requested of all needful Government documents, such as export licenses, preference rating certificates, BEW space applications, ODT permits, AAR permits, and comply with such other regulations as may from time to time be announced. These practices, of course, are necessary, due to wartime procedures at the present time.

A forwarder traces and follows up shipments and instructs common carriers, truckmen, or suppliers to effect delivery to piers, warehouses, terminals, or other places as required. Perhaps and clear through the Customs House export declarations, and prepare ocean bills of lading, drafts, consular papers, and other documents necessary to comply with the regulations of the country of destination.

Convert weights and measurements into metric system when necessary. Arrange for insurance protection on the freight. Forward all necessary documents to consignee and/or banks or other parties, as instructed by exporter. Check supplier's individual weights and measurements against steamship lines' assessments and reconcile them when necessary; advance all necessary freight charges and/or other expenses incurred on the shipment in behalf of the exporter.

The forwarder must keep a complete record of all shipments dispatched for the convenience of the exporter and prosecute such claims as may be required by the exporter against carriers, insurance companies and/or other parties at interest.

The forwarder, in normal times has up to the minute sailing schedules and keeps in constant touch with the steamship company to ascertain if any substitutes are made in the steamer name or changes in scheduled ports of call. These are most of the duties accomplished by the freight forwarder.

Q. Would you say, then, in short, that the freight forwarder is a sort of representative of the exporter or shipper? A. Yes, sir.

Q. And performs generally the functions that the shipper would ordinarily have to perform in order to see that the goods arrive at destination? A. Yes, sir."

Moreover, in the posture of the case as it reaches this Court, the appellant concedes<sup>10</sup> that appellees are "independent freight forwarders" and argues that, without more, the statute is applicable to them as such. That is to say, that Congress intended to bring within the ambit of regulation any person whose business it is to put foreign freight in way of dispatch under private arrangements with shippers, although an entire stranger to the carrier. This was also the apparent view of the Commission, which made no inquiry during the hearings and only one in its questionnaires as to the association, affiliation, or relationship, contractual or otherwise, of the appellees with any water carrier.<sup>11</sup> Although the Commission's Director of Regulation seems to concede that there may be forwarders not within the definition of the Act<sup>12</sup> and that the Commission is without power to issue orders until their business is defined (R. 75), it would be difficult to say who they might be, if the most independent category of such persons is to be included within the definition.

Under the Commission's construction of the statute, the words "in connection with a common carrier", are not words of limitation, are without significance, and the statute is to be construed as if it read "carrying on the business of forwarding in foreign commerce".<sup>13</sup>

10. Pages 22, 30 of appellant's brief.

11. See Note 1, *ante*, page 5 hereof.

12. Before the House Committee on Small Business, Mr. Hallett testified in response to a question from the Chair as follows (R. 95):

"The Chairman: Do you not think it would be helpful to everybody if we could attempt somehow to accomplish a definition of that term (forwarder) so that everyone would understand it?"

Mr. Hallett: With all due deference, I don't know whether we could do it at this particular place and time. The Court undoubtedly has to consider this matter because if they are not engaged in the forwarding described in the Act then we have no jurisdiction.

This was approximately one year after the official finding of jurisdiction in the August 21, 1942 order.

13. This is the way the Enforcement Division of the Commission thought the statute read. In the original order of August 21, 1942, the Commission "found" that the appellees and others "carry on the business of forwarding in foreign commerce" and are "an other person subject to this Act" (R. 11). The phrase was repeated in the first supplemental order (R. 15) in the second supplemental order (R. 16); and in the third supplemental order (R. 17), as the basis of the Commission's jurisdiction.

A similar phrase, however, had long appeared in the Interstate Commerce Act<sup>14</sup> which had been in force a generation when the Shipping Act of 1916 was passed, and similar terms in both Acts are to be similarly construed. *United States Navigation Co. v. Cunard S.S. Co.* (1932), 284 U. S. 474, 481.<sup>15</sup>

The phrase is a term of art. The words "in connection with any railroad" and "connected with such transportation" both appear in the Interstate Commerce Act. Section 1 (3), (49 U. S. Code 1 [3]) reads in part:

" \* \* \* The term 'railroad' as used in this chapter shall include all bridges, earfloats, lighters, and ferries used by or operated in connection with any railroad. \* \* \* The term 'transportation' shall include \* \* \* and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. \* \* \*

Section 15 (13) (49 U. S. Code 15 [13]) reads in part:

"If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, \* \* \*,

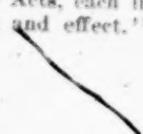
he shall receive an allowance from the carrier.

These phrases have uniformly been construed to mean only such equipment as is used by the railroad as part of its transportation facilities or services constituting a part of the transportation service rendered by the carrier.

14. Section 1 (3) (49 U. S. Code 1 [3]); Section 15 (13) (49 U. S. Code 15 [13]).

15. In the *Cunard S. S. Co.* case, the Court said (at p. 481):

"In this situation, the Shipping Act was passed. In its general scope and purpose, as well as in its terms that Act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two Acts, each in its own field, should have like interpretation, application and effect."



Such construction is consonant with the purpose and intent of both the Interstate Commerce Act and the Shipping Act, under both of which the incidence of regulation is upon the carrier and those who act with it, in such manner as to occasion discrimination. The evil of discrimination was the principal thing aimed at by both Acts (*Louisville and Nashville R. R. Co. v. United States* [1915], 238 U. S. 1, 8; *Merchants' Warehouse Co. v. United States* [1931], 283 U. S. 501, 512), and it is trite at this late date to observe that such discrimination may arise either by the rendition of the same service for a different rate, or by the assessment of the same rate for a different service.

To insure uniformity of both rates and service, the Interstate Commerce Act requires that if a service be performed by a carrier for one shipper, it must be performed for all shippers at the same rate (*Louisville and Nashville R. R. Co. v. United States, supra*); that if a shipper performs services "connected with such transportation", the carrier may and must pay for it (*Interstate Commerce Commission v. Diffenbaugh* [1911], 222 U. S. 42, 46;<sup>16</sup> *Union Pacific R. R. Co. v. Updike Grain Co.* [1911], 222 U. S. 215), in which cases the carrier was required to compensate the shipper for the elevation of grain in transit because the elevation was "connected with such transportation", within the meaning of the Act.

Other examples, such as the pre-cooling of refrigerator cars and icing of perishable produce in transit (*Atchison, Topeka, & Santa Fe Ry. Co. v. United States* [1914], 232 U. S. 199); the dipping of cattle in transit under quarantine laws (*Missouri, Kansas, & Texas Ry. Co. v. Skinner*

16. The Court, in the *Diffenbaugh* case (222 U. S. at p. 46) said:

"As the carrier is required to furnish this part of the transportation upon request, he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it."

(Cited with approval in *United States v. Baltimore & Ohio R. R. Co.*, 231 U. S. 274, p. 285.)

[1916], 61 Okla. 189; 160 Pac. 875) might be cited, but the principle is one of familiar application requiring no elaboration.

Conversely, if the service is not "connected with" such transportation, *i. e.*, part of the service which the carrier is required to furnish under the tariffs at its published rates, it may not compensate the shipper therefor. Thus, a carrier may not pay for lighterage service rendered by a shipper outside the free lighterage limits of New York Harbor (*United States v. Baltimore & Ohio R.R. Co.* [1913], 231 U. S. 274) "since the railroads are under no obligation to lighter the sugar", (*idem*) but may so compensate a shipper if such service is within the lighterage limits. A carrier may not make allowance for carting beer from its terminal to the consignee's warehouse (*Wight v. United States* [1897], 167 U. S. 512); nor for switching within an industrial plant after delivery since "no allowance is due for service \*\*\* after delivery has been made and transportation is at an end" (*The New York Central and H. R.R. Co. v. Gen. Elect. Co.*, 219 N. Y. 227, 234, 235; cert. den. 243 U. S. 636).

Here again, the principle requires no elaboration of authorities, it being plain that what is "connected with such transportation" may be compensated for, and what is not so "connected" may not be; and equally clear that what is "connected with transportation" is that which "the carrier is required to furnish."<sup>17</sup> The statutory provision so construed prevents a departure from the published rates, indirect rebates, and the discrimination effected thereby. The question, therefore, poses itself as to whether independent forwarding of the character at bar is transportation-connected. This Court has said specifically that it is not, and if connection with the carrier means connection with transportation, the appellees are excluded from the statute.

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17. See note 16 *ante*. (*Interstate Commerce Commission v. Difffenbaugh*, 222 U. S. 42).

In *Lehigh Valley R. R. Co. v. United States* (1917), 243 U. S. 444, this Court considered the propriety of payments made by a rail carrier to Sheldon and Company, an independent forwarder or shippers' agent of the same type as appellees. It was argued that such compensation was lawful under Section 15 of the Act because connected with the transportation. The Court, per Mr. Justice Holmes, said:

"The services rendered by George W. Sheldon & Company, although in a practical sense 'connected with such transportation,' were not connected with it as a necessary part of the carriage,—were not 'transportation service,' in the language of *Union P. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 220, 56 L. ed. 171, 173, 32 Sup. Ct. Rep. 39,—and, in our opinion, were not such services as were contemplated in the Act of June 29, 1906, chap. 3591, §4, 34 Stat. at L. 589, Comp. Stat. 1913, §8583, amending §15 of the original act. On the other hand, the allowance for them falls within the plain meaning of §2 of the Act of 1906, to which we referred above."

Since such forwarding was held not to be connected with the transportation because not a part of the carrier's services, it follows by analogy that the appellees are not within the definition of the Shipping Act,<sup>18</sup> but the phrases in the two statutes do not have identical words,—what then is meant by the term "connected with a common carrier" as distinct from "connection with transportation"?

We have already seen that "rates" and "services" are correlative factors and that a variance of either works

18. It appears plain that had Sheldon's contract been with a common carrier by water, he would have been forwarding in connection with such common carrier and within the meaning of Section 1 of the Shipping Act. It also appears plain that appellees are not within, unless they can be shown to have similar carrier connection.

a prohibited discrimination. But discrimination may be subtler, and in the competitive race for traffic, a carrier may extend a "non-transportation facility" to favored shippers to induce a movement of merchandise over its line. These facilities, sometimes called "carrier connected", "affiliated", or "accessorial", may be furnished by the carrier free,<sup>19</sup> or at non-compensatory rates,<sup>20</sup> or by a subsidiary or lessee of the carrier, or by financing structures in which carriers lease space from their own subsidiaries, or by other expedients. But in all cases where the carriers exercise sufficient control to make the facilities subservient to the competitive needs of the carriers, such facilities are said to be "in connection with accessorial services of the carriers."<sup>21</sup>

This, we think, is precisely what the Shipping Act means. It brings within the ambit of regulation those "engaged in the business of forwarding in connection with (or as accessorial services of) a common carrier by water." It is only where forwarding is so "carrier connected" or "affiliated", or "accessorial" under some continuing contractual<sup>22</sup> or other relationship with the carrier, analogous to the warehousing services condemned in *Baltimore & Ohio R. R. Co. v. United States* (1939), 305 U. S. 507, and *Merchants Warehouse Co. v. United States*, 283 U. S. 501, that the Shipping Act applies.

In the *Baltimore & Ohio* case, this Court sustained an order of the Interstate Commerce Commission, directing

19. See the *Merchants' Warehouse* case, *post*.

20. See *Baltimore & Ohio R. R.* case, *post*.

21. *Baltimore & Ohio R. R. Co. v. United States*, 305 U. S. 507, at p. 516.

22. Section 15 of the Act (46 U. S. Code 814) contemplates a contractual relationship between the carrier and such other person. It requires other persons subject to this chapter to file with the Commission:

" \* \* \* every agreement with another such carrier or other person subject to this chapter \* \* \* fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; \* \* \* "

the carriers to cease and desist<sup>23</sup> "from permitting shippers in Interstate Commerce over the carrier's lines from occupying space by lease or otherwise in warehouses, buildings, or on piers, owned or controlled directly or indirectly, by, or affiliated with the carriers" at non-compensatory rates. Such services, although forming no part of the transportation, were condemned as discriminatory, because they were connected, not with the transportation, but with the carrier.<sup>24</sup>

Had such services been rendered by independent warehousemen for the shippers under private contracts, at shippers' expense, divorced from all carrier association, the Commission would have had no jurisdiction of the matter and, indeed, it was in part upon the complaint of discrimination made by such private warehousemen that the carrier's practices were condemned.

*MERCHANTS' WAREHOUSE CO. v. UNITED STATES*, 283 U. S. 501, completes for our purposes the identification of carrier connected forwarding and accessorial carrier services.

In that case, certain rail carriers contracted with private warehousemen to furnish free to shippers over their lines the service of distributing and assembling carload lots of package freight which the carriers were not authorized or permitted to do. In holding that the furnishing of such accessorial services constituted a rebate under Sections 2 and 3 of the Interstate Commerce Act, the Court assimilated such warehousing services to the for-

23. See 305 U. S. at p. 513.

24. "The warehousing practices complained of," said the Court (p. 516), "are those in connection with accessorial services of the carriers, inaccurately designated commercial warehousing. Examples of such services are the storage and other warehousing services furnished by the carriers or their affiliates or subsidiaries, to enable shippers to hold and handle their commodities beyond the time allowed by transportation rates and in ways not required by rail movement itself."

The warehousing facilities were (p. 517) "subservient to the competitive needs of the carriers" and furnished to induce shippers to use particular rail facilities.

warding performed by Sheldon in *Lehigh Valley R. R. Co. v. United States, supra.* It said (p. 512):

"In point of substance the warehousemen were consignors and consignees of merchandise, and they alone could act as such in the case of carload shipments which they assembled or distributed. In this respect they do not differ from freight forwarders who render a like service so far as concerns their relations with carriers. *Lehigh Valley R. R. v. United States*, 243 U. S. 444."

Enough has been said to indicate that independent forwarding is not "transportation connected" because not part of the transportation, and that it is not "carrier connected" unless furnished as an accessorial service of a water carrier, and that only then can it be discriminatory. This, indeed, was the view taken by the Maritime Commission *In Re Gulf Brokerage & Forwarding Agreements* (1936), 1 U. S. M. C. 533,<sup>25</sup> where the Commission, to prevent discrimination, refused to approve ninety-two agreements filed with it for the purpose of fixing "the amount of the charges to be collected from shippers for forwarding services to be performed by the carriers and such other persons (forwarders)". It was the connection, association, or conjunctive relation between the carrier and the forwarder which led the Commission to condemn the character of the arrangement there presented to it. Indeed, the discrimination was identical with that implicit

25. The Commission there said (p. 534):

"Such services are described as including 'whatever is required to arrange the delivery from the inland carrier to the custody of the ocean carrier when the rail rate or charge as collected by the inland carrier does not cover that particular service.' Some of the services referred to in the record \* \* \* are of a character which cannot properly be performed by common carriers."

As in the *Baltimore & Ohio R. R. case, supra*, the carrier connected forwarder was to render services which could not "properly be performed by common carriers", i. e., accessorial non-transportation services.

in the *Baltimore & Ohio* case. There the carrier's "entrance into warehousing was brought about by a desire to induce shippers to use particular rail facilities";<sup>26</sup> and in the *Gulf Brokerage and Forwarding Agreements* case, the Maritime Commission, apprehending that like discrimination would result under the proposed carrier-forwarder agreement, frowned upon it in advance.<sup>27</sup>

The appellant cites *State of California v. United States* (1944), 320 U. S. 577, in its favor, but we think that case supports the appellees' views. The facilities there regulated were, if not essentially part of the transportation, at least accessory to it, and some of the charges there collected for wharf use and storage, have under the Interstate Commerce Act, been held to be actually part of transportation. In that case, the District Court described the operation (46 F. Supp. 474, 477):

"The Board assigns pier space to the various steamship lines, giving them a preferential use of the piers, for which it charges a rental. It also collects dockage on vessels and tolls on cargo, as well as demurrage and storage charges. All revenues from handling, loading, and accessory services are collected and retained by the assignees."

It would be difficult to find a better example of carrier connection. Storage after tender of delivery by a rail carrier "is undoubtedly a terminal service forming a part of the transportation". *Southern Ry. Co. v. Prescott* (1916), 240 U. S. 632; and so, by analogy, is dock storage after delivery from shipside; *a fortiori*, where

26. 305 U. S. at p. 517.

27. The Commission said (1 U. S. M. C. at p. 535):

" \* \* \* the Department will not approve agreements under which the forwarder, whether also a broker or not, would refuse to handle as a forwarder shipments as to which routing by a competing carrier has been specified by the shipper."

the carrier retains the revenue. Demurrage is in a like class (*Emmons Coal Mining Co. v. Norfolk & Western Ry. Co.* [1927], 272 U. S. 709; cf. *Turner Dennis and Lowry Lumber Co. v. Chicago Milwaukee & St. Paul Ry. Co.* [1926] 271 U. S. 259) and a public wharf operated by a steamship company has been held to be operated "in connection with its business of a common carrier" (*Northern Commercial Co. v. United States* [1914] {C. C. A. 9th} 217 Fed. 30, 32).

In conclusion, we say that the forwarding of the appellees is neither carrier nor transportation-connected nor accessorial to the carrier's service. Appellees are only shippers, for the agent of the principal is in law, the principal; and it was not the intent of Congress to regulate shippers or their servants; but only carriers and their servants.

### III.

*/There was no evidence before the Commission on the whole record to show carrier connection of appellees and its action was wanting in due process of law.*

Under Section 23 of the Shipping Act (46 U. S. Code 822)<sup>28</sup> orders may be made by the Commission "only after full hearing" and then, under familiar principles of law, only if there is some evidence in the record to sustain its findings and order, for an order without findings (*State of Florida v. United States*, 282 U. S. 194) or a finding without evidence is void (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38; *United States v. Abilene and S. Ry. Co.*, 265 U. S. 274). In this case there was no

28. "Orders of the commission relating to any violation of this chapter shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion." \*\*\*

Cf. §15 (2) Interstate Commerce Act (49 U. S. Code 15-[2]).

bearing and no intent of holding one,<sup>29</sup> to determine the carrier connection of the appellees before the order of May 18, 1943 was issued. We say, therefore, that it is void, since it was the duty of the Commission to inquire of each appellee whether it was carrier connected before subjecting it to the penalties involved for disobedience to that order.<sup>30</sup> It was, moreover, the duty of the Commission to give each appellee an opportunity to be heard on the subject without abortively adjourning the hearings and preemptorily issuing its mandate.

The answer to question 2 of the preliminary questionnaire (R. 32, 136), wherein the appellees are said to have admitted their carrier connection, was the only "evidence" of such connection before the Commission when it issued its order of May 18, 1943. This is not enough to establish the Commission's jurisdiction, particularly when contradicted by the facts.<sup>31</sup> What the Act requires is a "full hearing"<sup>32</sup> and knowledge of the purpose of it, for, as this Court said in *Morgan, et al. v. United States* (1938),<sup>33</sup> 304 U. S. 4, 18:

"The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."

<sup>29</sup> None of the questions propounded in the questionnaires of January 21, 1943 (R. 23) or of May 18, 1943 (R. 28, 29) sought to elicit information as to the appellees' relation with any carrier. They probed only the relationship between the appellees and their customers.

<sup>30</sup> Of course, the apt procedure for the Commission to have followed was to have issued a Section 21 order to the carriers under its jurisdiction, requiring them to report their forwarder connections, if any.

<sup>31</sup> We pass, as unworthy of comment, the statement of Commission's counsel that it had four letterheads of appellees in its files (R. 32).

<sup>32</sup> In *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, the Court said:

"All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; \* \* \*

The appellees had no such knowledge when they answered the preliminary questionnaire, and it is doubtful if the requirements of due process of law are satisfied by the expedient of securing an answer to such a document, the meaning and intent of which was unexplained. Such a covert procedure seems to fall short of the essentials of a fair hearing specified in the concurring opinion of Brandeis, J., in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 73.<sup>33</sup>

Moreover, the answer at best was a conclusion of law made by laymen, contradicted by the negative answer given by them to question No. 33 (R. 137) and by the testimony of the Commission's sole witness (R. 54, 55).<sup>34</sup> The Court below, accordingly, quite properly concluded that the evidence "contradicts the admission made by said affirmative answer" (R. 129).

If, therefore, appellees' interpretation of the statute is a correct one and "carrier connection" implies a closer relationship than that growing out of the mere issuance of a bill of lading, there was no evidence of any kind before the Maritime Commission upon which it could conclude that the appellees are "other persons subject to this Act". The order is accordingly arbitrary, capricious, and void. *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.* (1913), 227 U. S. 88, 91, 92;<sup>35</sup> *The Chicago Junction case*, 264 U. S. 258, 264, 265, note 9 and

33. "The inexorable safeguard which the due process clause assures is, \* \* \* that the tier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed."

34. See note 9, *supra*, where the testimony is quoted in full.

35. In that case, the Court said (p. 91):

"\* \* \* it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'."

cases there cited,<sup>36</sup> and bought in the language of the statute, to be set aside by a court of competent jurisdiction.<sup>37</sup>

It, of course, goes without argument that if the appellees are not on the record "other persons subject to this Act", that the Commission has exceeded its statutory powers, and that the order is void. *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 562, 563.

### Conclusion.

For the reasons above stated, it is respectfully submitted that the decision of the Court below, setting aside and enjoining the enforcement of the order of May 48, 1943, be sustained; that this Court review the antecedent proceedings wherein the statute of the appellees as subject to the jurisdiction of the Maritime Commission was determined, and hold the said proceeding as void for want of due process of law, and that this Court hold that appellees are not "other persons" subject to the Shipping Act, 1916.

HAROLD L. ALLEN,  
Attorney for the Appellees.

36. In the *Chicago Junction* case, the Court said (p. 265):

"To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

37. Section 23 Shipping Act, 1916 (46 U. S. Code 822); cf. Section 15 (2) Interstate Commerce Act (49 U. S. Code 15 [2]).

# MICROCARD

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## APPENDIX.

The Shipping Act of 1916, as amended (39 Stat. 728, 46 U. S. Code 801, *et seq.*), provides in part as follows:

**Section 1 (46 U. S. Code 801):**

When used in this chapter:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce".

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this Act" means any person not included in the term "common carrier by water", carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by

the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

The term "vessel" includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

The term "documented under the laws of the United States", means "registered, enrolled, or licensed under the laws of the United States".

### Section 15 (46 U. S. Code 814):

Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or be-

tween exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission.

All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of \$1,000 for each day such violation continues, to be recovered by the United States in a civil action.

#### Section 21 (46 U. S. Code 820):

The commission may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time

prescribed by the commission. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of \$100 for each day of such default.

Whoever wilfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or wilfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than \$1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

Section 23 (46 U. S. Code 822):

Orders of the commission relating to any violation of this chapter shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the United States Maritime Commission, other than for the payment of money, made under this chapter, as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

Section 31 (46 U. S. Code 830):

The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the commission shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

# SUPREME COURT OF THE UNITED STATES.

No. 44.—OCTOBER TERM, 1945.

The United States of America,

Appellant,

vs.

American Union Transport, Inc.,  
D. C. Andrews & Co., Inc., At-  
lantic Forwarding Co., Inc., et al.

Appeal from the District  
Court of the United States  
for the Southern District  
of New York.

[February 25, 1946.]

Mr. Justice RUTLEDGE delivered the opinion of the Court.

The United States appeals from a decree entered by a District Court of three judges permanently enjoining enforcement of an order of the United States Maritime Commission. The order required the appellees and others to answer within thirty days a questionnaire concerning certain aspects of their business transacted during 1940, 1941 and 1942.<sup>1</sup> The central issue is whether appellees are within the coverage of the Shipping Act, 46 U. S. C. § 801, for this purpose.

On August 21, 1942, the Commission, upon its own motion, ordered an investigation concerning the lawfulness of the rules, regulations, practices and operations of named persons and firms, described as carrying on "the business of forwarding in foreign commerce." The order stated that from information before the Commission it appeared that a certain forwarding firm was engaging in practices which seemed to be in violation of § 17 of the Shipping Act, 46 U. S. C. § 816, and further "that the public interest requires a general inquiry to determine the extent of the said practices among all other forwarders in the port of New York subject to said Act, and the lawfulness of said practices under section 17 thereof . . . ."

Accordingly, the Commission sent to the persons and firms named a questionnaire containing the inquiry, among others, "Do you carry on the business of forwarding in connection with common

<sup>1</sup> See note 4. Jurisdiction rests on § 31 of the Shipping Act, 46 U. S. C. § 840; 28 U. S. C. §§ 47, 47a; 28 U. S. C. § 345(4). See *California v. United States*, 320 U. S. 577, 579.

2. *United States vs. American Union Transport, Inc. et al.*

carriers by water in foreign commerce?"<sup>2</sup> Each of the appellees answered this in the affirmative.<sup>3</sup> But negative answers were given to the question, "Is your company owned or controlled by or affiliated with any shippers for whom you act as forwarder or with any common carrier?"

In December, 1942, the Commission held public hearings before a trial examiner pursuant to the investigation order. On the second day the hearings were adjourned *sine die* so that the Commission might obtain additional information. They have not been resumed.

On January 14, 1943, the Commission entered an order, pursuant to § 21 of the Shipping Act, 46 U. S. C. § 826, directing appellees and others to answer a questionnaire relating to their forwarding operations in 1940, 1941 and 1942. The answers were to be filed within thirty days. Before this period expired appellees instituted this suit to enjoin the carrying out of that order and the general order of investigation. Thereafter the Commission extended the time for answering the questionnaire, and on May 18, 1943, withdrew its order of January 14, issuing instead another under § 21. This order, like the earlier one, required the appellees to answer a questionnaire concerning their forwarding operations. The only difference, apparently, was that the information sought was somewhat more extensive. The parties agreed that the suit should be continued as against the order of May 18 without formal amendment of the complaint.

On November 30, 1943, the District Court denied the Commission's motion for summary judgment and granted a temporary injunction restraining execution of the May 18, 1943, order. The injunction was made permanent on November 30, 1944.<sup>4</sup> The

<sup>2</sup> The inquiry was framed with reference to the statutory provision immediately in issue, namely, the definition of "other person subject to this Act" contained in § 1 of the Shipping Act, 46 U. S. C. § 801, set forth hereinafter in the text.

<sup>3</sup> In their complaint the appellees allege that the affirmative answers given were erroneous and were made "without knowledge of the import of the said question or of the kind or nature of the business which it was necessary to carry on, or the character of relationship with a common carrier by water in foreign commerce, which it was necessary to maintain, in order to fall within the said definition."

<sup>4</sup> The opinion of the District Court on motion for interlocutory injunction and on motion for reargument is reported in 55 F. Supp. 682. The opinion on final judgment, which was simply an adherence to the court's previous opinion, is not reported.

court held that the Maritime Commission had no jurisdiction over the appellees since, in its view, they did not come within the definition of the term "other persons subject to this Act" given in §1 of the statute, 46 U. S. C. § 801. It refused, however, to enjoin the order of August 21, 1942, on the ground that it had no jurisdiction to annul an order which itself did not adversely affect the complaining parties.

The question we are to review is whether the appellees are included within the designation "other person subject to this Act" as that phrase is defined in §1 of the Shipping Act. The definition reads: "The term 'other person subject to this Act' means any person not included in the term 'common carrier by water' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities *in connection with* a common carrier by water." (Emphasis added.)

Substantially, the issue turns upon the meaning of "in connection with," that is, whether some relation of affiliation with the carrier is required, such as that exemplified in *Railroad Retirement Board v. Duquesne Warehouse Co.*, Nos. 95 and 103, this Term, decided January 2, 1946; or, on the other hand, the statutory phrasing is satisfied by the type of relationship illustrated by the companion cases of *California v. United States* and *City of Oakland v. United States*, 326 U. S. 577.<sup>5</sup>

If, as appellees contend, "in connection with" covers only forwarding businesses actually affiliated with a common carrier by water in a corporate sense, or under the control of or pursuant to a continuing contract with such a carrier, then plainly the Maritime Commission is without jurisdiction over these appellees, since none of them is controlled by or affiliated with a common carrier by water in any such manner. All are so-called independent forwarders and the case comes down to whether such forwarders are covered by the Act.

There is little or no dispute as to the nature of their business. They are primarily forwarders of freight, as that term is gen-

<sup>5</sup> The agencies found subject to the Act in these cases were public authorities. Although some continuing contractual relationship may have existed between the state wharfinger and the carriers in the *California* case, no such relation existed, except as to one pier, in the *Oakland* case, a fact of which the District Court in this case obviously was not informed, in view of its contrary statement. See note 17.

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erally understood,<sup>6</sup> for transshipment in foreign commerce. The foreign freight forwarding business is a medium used by almost all export shippers. An exporter, intending to send goods abroad, consigns the merchandise to a forwarder who then makes all the arrangements for dispatching it to a foreign port. The forwarder must arrange for necessary space with the steamship companies, procure and prepare the many documents, obtain permits for the acceptance of freight at piers, and at times must find available storage space for the shipment until steamers are available. If requested to do so, a forwarder will secure whatever insurance is needed.

Forwarders also have many other incidental duties. They check the marks on shipping papers and containers in order to be certain that they are in accordance with the regulations of the country of destination. They convert weights and measurements into the metric system when necessary. They keep records, for the convenience of the exporter, of all shipments dispatched. They also prosecute such claims as may be required by the exporter against carriers, insurance companies, and any other parties in interest.

By engaging in these many activities of the forwarding business, independent forwarders—and particularly the appellees—act as agents of the shipper. They assume no responsibility for the transportation of goods.

We think the appellees are within the coverage of § 1. This conclusion is required not only by the broad and literal wording of the definition but also to make effective the scheme of regulation the statute established and by considerations of policy implicit in that scheme, as well as by the legislative history and the decision

<sup>6</sup> See *Place v. Union Express Co.*, 2 Hilt. (N. Y.) 19, 25; *In re Emerson, Marlow & Co.*, 199 Fed. 95, 97; H. Rep. No. 1682, 77th Cong., 2d Sess. 5 *et seq.* Cf. the definition of "freight forwarder" in Part IV of the Interstate Commerce Act, 49 U. S. C. (Supp. IV) § 1002(a)(5), discussed at a later point in this opinion.

In addition to acting as freight forwarders, the appellees also act as freight brokers. And for their services as brokers they receive brokerage commissions or fees from the carrier with respect to the same shipments for which they act as forwarders.

In view of the disposition we make of the cause, we need not consider the argument made by the Government that in any case the appellees, because they also act as freight brokers and receive compensation from the carriers, come within the Maritime Commission's jurisdiction. Cf. *In re Gulf Brokerage and Forwarding Agreements*, 1 U. S. M. C. 533, 534, where it was said: "Brokers are not subject to the Shipping Act, 1916, and consequently agreements between carriers subject to that act and brokers are not of the character required to be filed within section 15 thereof."

in the *California* and *Oakland* cases, *supra*. In order to place the discussion of our reasons in statutory as well as factual setting, we sketch below some of the more pertinent statutory provisions. In doing so we shall emphasize the consequences of including or excluding so-called independent forwarders, like the appellees, for effective administration of the Act and achievement of its policy. But first we turn to the definition in § 1 itself.

The language is broad and general. No intent is suggested to classify forwarders, covering some but not others, just as none appears to divide persons "furnishing wharfage, dock, warehouse, or other terminal facilities" into regulated and unregulated groups. *California v. United States*; *Oakland v. United States*, *supra*. The absence of any such suggestion becomes highly significant by contrast with similar definitions of other statutes more or less related to the Shipping Act. In these Congress, when regulating carriers and "other persons," repeatedly has made plain the intent to cover only affiliates or other specially limited groups when this has been in fact its purpose.

Thus, in the legislation relating to railroads, forwarders were first covered expressly in 1942, 49 U. S. C. (Supp. IV) § 1002(a)(5). The definition in shortened paraphrase is limited to any "person," other than a carrier, holding itself out "to transport or provide transportation" which "in the ordinary and usual course of its undertaking" (A) performs the usual functions of a forwarder, "and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers . . . ." (Emphasis added.) Not only would language so explicitly limited be difficult to apply to a person not performing any part of the "transportation service" proper, cf. *Lehigh Valley R. Co. v. United States*, 243 U. S. 444; but the very limitations, altogether absent from § 1 of the Shipping Act, forbid identical constructions of the two definitions. See also, in relation to the different treatment of rail forwarders, the correlated definition of "service subject to this chapter," 49 U. S. C. (Supp. IV) § 1002(a)(7).

The same difference applies with reference to the definitions of the term "employer" in the Railroad Retirement Act of 1937, 45 U. S. C. § 228a, and the Railroad Unemployment Insurance Act of

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1935, 45 U. S. C. § 351, construed in *Railroad Retirement Board v. Duquesne Warehouse Co.*, *supra*. In each instance the statute declares that "employer" shall mean "any carrier . . . and any company" carrier-owned or controlled "and which operates any equipment or facility or performs any service . . . in connection with the transportation of passengers or property . . .," thus plainly setting forth as to others covered than the carrier both the affiliation requirement and that of performing part of the transportation service.

In the face of such repeated demonstrations that Congress makes its purpose plain, when it actually intends to limit the coverage of others than carriers to affiliates or to persons performing part of the transportation service, the conclusion hardly is tenable that it means the same thing when it employs more broadly inclusive language and wholly omits all such limitations. This view is further emphasized, as will appear, by the fact that to cut down the meaning of § 1 as appellees suggest would be to single out the term "forwarding" from all others in the definition and give to it a narrow application none of them possesses.

In view of these facts, it is doubtful that the wording of the definition is sufficiently ambiguous to require construction, more especially in view of the decisions in the *California* and *Oakland* cases. But if room for doubt remains, it is altogether removed by the considerations of policy and history to which we have referred. We turn accordingly to the statutory setting.

In several sections, for example, §§ 15, 16, 17, 20 and 21 (pursuant to which this proceeding began), "other persons" as well as common carriers by water either are made subject to affirmative duties or are prohibited from engaging in certain activities.

Section 15<sup>7</sup> requires filing of specified agreements or memo-

<sup>7</sup> "Every common carrier by water, or other person subject to this Act, shall file immediately with the board [commission] a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The board [commission] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previ-

anda with the Commission and exempts from the operation of the antitrust laws arrangements made by carriers and "other persons" among themselves or with one another which have been filed with *and approved by* the Commission.<sup>8</sup> The Commission is given the power to disapprove, cancel or modify, among others, any agreement which it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between United States exporters and their foreign competitors; or to operate to the detriment of the commerce of the United States; or to be in violation of the Act. Obviously agreements or understandings between forwarders or between forwarders and shippers or between forwarders and carriers may be discriminatory in such a way as to violate the provisions of § 15. Moreover, since forwarders arrange the terms of carriage for shippers with carriers, they may be the active agents who bring about the very types of agreement or arrangement the section contemplates. The Commission shall have power and opportunity to outlaw,

unjustly approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the board [commission] shall be lawful until disapproved by the board [commission]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board [commission].

"All agreements, modifications, or cancellations made after the organization of the board [commission] shall be lawful only when *and as long as approved by the board [commission]*, and before approval or after disapproval, it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation *lawful under this section* shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section shall be liable to a penalty of \$1,000 for each day such violation continues, to be recovered by the United States in a civil action." 39 Stat. 738; 46 U. S. C. § 814. (Emphasis added.)

<sup>8</sup> See the language of the statute, note 7 *supra*; and see Legislation, 17 Col. L. Rev. 357, 358. It should not be necessary to emphasize, in view of the statute's plain language, that, as it is stated, the exemption arises *not* upon the mere filing of the agreement, *but only after approval* by the Commission.

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Consequently jurisdiction by the Commission over forwarders would seem essential to effectuate the policy of the Act and the absence of jurisdiction well might prevent giving full effect to that policy.

Section 16<sup>b</sup> forbids various forms of discrimination, as well as other practices, on the part of any common carrier by water "or other person," which an independent forwarder readily may commit or induce. It is suggested, however, that whatever discriminations might be practiced necessarily would be in pursuance of an agreement between a carrier and a forwarder who, it is well to point out again, acts as agent of the shipper; and that since Congress has given the Commission jurisdiction over the carriers, it is to be presumed that such jurisdiction was thought to be sufficient.

Whether or not the premise is correct, the conclusion does not follow. That the Commission may have jurisdiction over one of the two parties to a discriminatory agreement or arrangement hardly means that it shall not have jurisdiction over both. Indeed, unless the jurisdiction includes both, it may be ineffective as to the one covered; for the Commission then might lack the necessary means of obtaining or checking upon information (cf.

<sup>a</sup> "That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

"That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

"Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

"Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than \$5,000 for each offense." 39 Stat. 734, as amended by 49 Stat. 1518; 46 U. S. C. § 815. (Emphasis added.)

[21] necessary to ascertain the existence of a discrimination or to take other action commanded by the statute. Moreover, some of the practices forbidden appear to be peculiarly if not exclusively susceptible of commission or inducement by forwarders, brokers and shippers' agents, all specifically mentioned in the section.

The purpose of § 17,<sup>10</sup> in relevant part, is to provide for the establishment, observance and enforcement of just and reasonable regulations and practices relating to or in connection with the receiving, handling, storing or delivering of property. By the nature of their business, independent forwarders are intimately connected with these various activities. Here again, unless the Commission has jurisdiction over them, it may not be able effectively to carry out the policy of the Act.

Section 20,<sup>11</sup> which for the most part was copied from § 15(11) of the Interstate Commerce Act, forbids the disclosure of confidential information by a common carrier by water or other person,<sup>12</sup> when the information might be used to the detriment or prejudice of a shipper or consignee, or of a carrier, or might improperly disclose his business transactions to a competitor.

<sup>10</sup> "Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board [commission] finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice." 39 Stat. 734; 46 U. S. C. § 816. (Emphasis added.)

<sup>11</sup> That it shall be unlawful for any common carrier by water or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee of such carrier or person, or for any other person authorized by such carrier or person to receive information, knowingly to disclose to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier or other person subject to this Act for transportation in interstate or foreign commerce, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor, or which may be used to the detriment or prejudice of any carrier; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used." 39 Stat. 735; 46 U. S. C. § 819. (Emphasis added.) Exceptions are made for disclosure in response to legal process, etc.

<sup>12</sup> Section 15(11) of the Interstate Commerce Act, 15 U. S. C. § 15(11), does not contain the "other person" provision. The coverage of the two sections, however, is so broad that it probably would include forwarders even though they were not within the coverage of other sections.

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Finally, § 21, which is immediately involved in this case, requires the filing of reports, records and documents relating to the business of persons subject to the Act.

The intimate relationship of the forwarder to both shipper and carrier, essentially that of go-between, gives him not only unique sources of information, perhaps in its totality available to no one else, but also unique opportunity to engage in practices which the Act contemplates shall be subject to regulation, some of which we have emphasized in quoting the statutory provisions. The statute throughout is drawn in very broad terms. It forbids direct or indirect accomplishment of the outlawed acts. It broadly covers specific practices, including false billing, classification, weighing, and the manner of placing insurance, § 16, as well as general practices resulting in forbidden evils, §§ 15, 17, which forwarders, affiliated or independent, are favorably placed to bring about. It mentions forwarders specifically, not only in § 1, but elsewhere, e.g., § 16, without suggestion of distinction between independent and affiliated operators. To include the latter but exclude the former would be incongruous, not only for want of any such explicit suggestion, but because inclusion of one without the other would create a statutory discrimination tending in time to force out the affiliated forwarder and, with that achieved, to remove forwarding entirely from the reach of the regulatory plan. We do not believe that Congress had in mind such a self-defeating scheme. Almost as well might it have exempted all forwarders in the first place. Nor do we think the design of the Act was merely by indirection to forbid carriers or their affiliates to act as forwarders.

The legislative history clearly supports this view, although for explicit statement it is scanty. No discussion concerning the meaning of "any person [not a carrier] carrying on the business of forwarding . . . in connection with a common carrier by water" appears except in the statement of the manager of the bill in the House of Representatives.<sup>13</sup> When dealing with the breadth of the term "other person subject to the Act," he said: "Hence, if this board [the United States Shipping Board] effectively regulates water carriers, it must also have supervision of all those incidental facilities connected with the main carriers . . ." 53 Cong. Rec. 8276. Certainly this language is not

<sup>13</sup> Representative Alexander, then Chairman of the Committee on the Merchant Marine and Fisheries.

indicative of intent to give a narrowly restricted scope to the definition's coverage. Quite the opposite is its effect.

The more significant legislative history, however, appears in the metamorphosis which this provision of § 1 underwent during the process of enactment. A predecessor bill (H. Rep. 14337, 64th Cong.) worded the definition as follows:

"The term 'other person subject to this act' means any person not included in the term 'common carrier by water' and carrying on the business of ~~forwarding, ferrying, towing,~~ or furnishing ~~transfer, lighterage,~~ dock, warehouse, or other terminal facilities *in or in connection with the foreign or interstate commerce of the United States.*" (Emphasis added)

As this was revised in the bill which was enacted (H. Rep. 15455, 64th Cong.), two changes occurred, apart from adding explicit mention of wharfage as among the terminal services. One was to eliminate the words "ferrying, towing, . . . transfer, lighterage." The other was to substitute "*in connection with a common carrier by water*" for "*in or in connection with the foreign or interstate commerce of the United States.*"

Had this latter wording been retained there could not have been the remotest basis for suggesting that independent forwarders were not covered, as there could have been none with reference to any of the other businesses or services mentioned. But, for a reason wholly unrelated to narrowing the class of forwarders and others not carriers who had been included, the original concluding phraseology was changed. That language was obviously inexact when applied, as the Shipping Act did apply, to carriage by water and incidental activities. Taken literally, the broad wording would have included forwarders and others furnishing terminal facilities in connection with shipments by rail. Obviously it was to eliminate this incongruity, and not to constrict the classes of "other persons" previously enumerated, that this change was made.

That it had no other purpose appears, moreover, from the elimination of "ferrying, towing . . . transfer, lighterage," which shows that when Congress wished to cut down the classes originally covered it did so attentively and explicitly. These eliminated persons were included originally, along with forwarders and others, not simply to reach affiliates of carriers, but broadly to provide "for equal treatment to all shippers and water carriers

by transfer and lighterage concerns *when forming a link in interstate or foreign commerce*.<sup>14</sup> (Emphasis added.) Nothing in the hearings, the committee reports, or the debates, upon the original or the substituted bills,<sup>15</sup> suggests either an original intention to restrict to carrier affiliates the coverage of forwarders or other furnishers of terminal or "link" service or a later intention to change the initial broad coverage by so restricting it. Silence so complete cannot be taken as the voice of change. The original congressional purpose clearly was to reach all who carry on the specified activities, whether in or out of affiliation with a carrier. That purpose remained unaltered by anything which took place in the course of transition from the first to the final form in which the bill was enacted.

Indeed, we held as much in the cases of *California v. United States* and *City of Oakland v. United States, supra*. The decision was that the Commission has jurisdiction over state and municipally owned businesses furnishing terminal facilities. The ruling would include *a fortiori* privately owned independent businesses of the same type. It would be a strange reading of the "other person" provision if forwarders alone were required to be affiliated in order to come within its terms, all others, covered in both the original and the final forms of the legislative proposals being either independent or affiliated. Yet this is, in effect, appellees' exact contention and the view taken by the District Court. As has been noted,<sup>16</sup> that court misconceived the facts in the *Oakland* case and thus perhaps, at the time of entry of its final order, the full scope and effect of our decision.<sup>17</sup> At any rate, since Congress has

<sup>14</sup> H. Rep. No. 659, 64th Cong., 1st Sess., 32. It is true that no comparable explicit statement appears concerning forwarding or terminal activities. But in the absence of distinguishing language, the original coverage of "ferrying, towing . . . transfer, lighterage" hardly can be taken to have been broader, as respects affiliation, than "forwarding, . . . or furnishing dock, warehouse, or other terminal service"; and the elimination of the former cannot be said to have restricted the latter in this respect or, in view of the decision in the *California* and *Oakland* cases, to have singled out forwarding alone for such restriction.

<sup>15</sup> Hearings on H. Rep. 14337 before the House Committee on the Merchant Marine and Fisheries, 64th Cong., 1st Sess.; Hearings on H. Rep. 15455 before the Senate Subcommittee on Commerce, 64th Cong., 1st Sess.; H. Rep. No. 659, 64th Cong., 1st Sess.; S. Rep. No. 689, 64th Cong., 1st Sess.

<sup>16</sup> See note 5.

<sup>17</sup> The District Court's opinion, 55 F. Supp. 682, was filed November 30, 1943, and refers to the *California* case, but it makes no reference to the *Oakland* case, although both were then pending here. The court's further

indicated no intention to single out forwarders for regulation only when they are affiliated with a carrier, while at the same time broadly covering terminal operators and others, we are not free to inject such a distinction.

What has been said disposes of the principal contentions and issues. Appellees however offer other arguments, founded chiefly in the absence of prior established administrative practice,<sup>18</sup> but also in the history of interstate commerce legislation affecting nonwater transportation and in decisions relating to that legislation.<sup>19</sup> We regard these considerations as inapposite to the problem raised by this case in connection with the quite different wording, coverage, history and, to some extent, policy of the Shipping

opinion, filed March 8, 1944, upon the motion for reargument, makes no reference to either of these cases. The findings of fact and conclusions of law were filed November 30, 1944, and judgment was entered the same day, nearly eleven months after our decision in the *California* and *Oakland* cases had been announced on January 3, 1944. As has been stated, see note 5, in the *Oakland* case, except in one instance, there was no showing of affiliation with a carrier, whether by continuing agreement or otherwise.

<sup>18</sup> It is pointed out that until the present proceeding neither the United States Maritime Commission nor its predecessor, the United States Shipping Board, attempted to exercise jurisdiction over forwarders such as the appellees. See, however, Fifth Annual Report of the United States Shipping Board, p. 10. It is not to be inferred however that either of those bodies held the view that they were without such jurisdiction or that, if either did, that fact would be conclusive. An administrative agency is not ordinarily under an obligation immediately to test the limits of its jurisdiction. It may await an appropriate opportunity or clear need for doing so. It may also be mistaken as to the scope of its authority. Cf. Social Security Board v. Nierotko, No. 318, this Term, decided this day.

Although failure to exercise power may be significant as a factor shedding light on whether it has been conferred, see Federal Trade Commission v. Bunte Bros., 312 U. S. 349, that fact alone neither extinguishes power granted nor establishes that the agency to which it is given regards itself as impotent. The present case, by virtue of differences from that of *Bunte Bros.* relating to the clarity and definiteness of the statute's terms, the policy of the Act, and the legislative history, is one which falls within the pronouncement: "Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise." 312 U. S. at 352.

<sup>19</sup> Appellees strongly urge that this case is governed by the construction of the phrase "in connection with transportation" in the Interstate Commerce Act, cited and discussed in the text above (see *Lehigh Valley R. Co. v. United States*, 243 U. S. 444), and for this view rely upon *United States Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474, 481, which held that the Shipping Act and the Interstate Commerce Act, "each in its own field, should have like interpretation, application and effect." As we have stated, the phrase "connected with transportation," in the entirely different setting of the Interstate Commerce Act, is so dissimilar in terms and setting to the phrase "in connection with a common carrier by water" as used in the Shipping Act that the interpretation of the former cannot be controlling in determining the meaning of the latter.

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Act, for reasons already set forth in part and for others briefly indicated in the marginal notes attached to this paragraph.<sup>20</sup>

It remains only to notice the further objections that the case does not involve the use of forwarders by carriers to evade regulations applicable to carriers; and that to hold independent forwarders "subject to the Act" will bring them under its regulatory provisions, in other words, will make them "subject to the Act."

Needless to repeat, it is precisely because we think the latter effect is required by the considerations already set forth that our conclusion has been reached. Moreover, support for it is given by the very terms of the specific regulatory provisions cited to contradict it, as we have pointed out.<sup>21</sup> The ground need not be traversed again. The cited provisions, like § 1, are broad and general. They strike at evils as likely to be perpetrated by independent forwarders as by any of the "other persons" admittedly covered by the Act. They afford no suggestion of application narrowed to affiliated forwarders or of other distinction between them and independent forwarders, such as invariably and in the clearest terms Congress has stated whenever it has dealt with forwarders by land.

The common sense of all this, of course, is that Congress knew what it was about in both instances. We cannot ignore its repeated demonstrations of that fact. To do so would be to rewrite the statute, injecting limitations of affiliation no more rightfully within our function than inserting others of physical participation in the transportation service proper or of financial responsibility for it. These admittedly cannot go in, although there would be as much warrant for adding them as for putting in affiliation.

Statutes may be emasculated as readily and as much by unauthorized restricted reading as by one unduly expansive. And the wisdom of the regulation of forwarders with the corresponding restriction of competitive freedom in the business is the concern

<sup>20</sup> Appellees' contentions that there was no evidence to support a finding by the Commission that they were engaged in the business of forwarding "in connection with" a common carrier by water and that the District Court erroneously refused to set aside the order of August 21, 1942, are founded in their view that the Act requires affiliation. For this and other reasons it is not necessary to consider them further.

<sup>21</sup> See notes 7, 9, 10, and discussion in the text.

of Congress, not of this Court. We leave the statute as Congress enacted it.

It is inherent in the view we take of the statute that more is involved than merely a carrier's attempt to immunize itself against the Act's penalties by using a forwarder to evade the regulations made binding on carriers. In that respect forwarders are obviously no different from other persons, for the *Act* does not permit such evasion by a carrier whether through the use of forwarders or any other persons. What is more important is that the *Act* is designed and in terms undertakes not only to prevent such evasion by carriers through denying them immunity when they hide behind forwarders; it also denies immunity to the forwarders themselves when they commit the acts or practices carriers and others subject to the *Act* are forbidden to perform.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

# SUPREME COURT OF THE UNITED STATES.

No. 44.—OCTOBER TERM, 1945.

United States of America, Appellant, } On Appeal from the  
vs. } District Court of the  
American Union Transport, Inc., D. C. } United States, for the  
Andrews & Co., Inc., Atlantic For- } Southern District of  
warding Co., Inc., et al. } New York.

[February 25, 1946.]

Mr. Justice FRANKFURTER dissenting, with whom Mr. Justice BLACK and Mr. Justice DOUGLAS concur.

It is important to keep in mind what this case is not. It does not involve the power of the Maritime Commission to obtain from a forwarder all information relevant to any inquiry by the Commission, based on complaints of violations of the Shipping Act or on its own motion. Section 27 of that Act gives the Commission such subpoena powers and subjects every person, forwarder or not, to testimonial compulsion. 39 Stat. 728, 737, 46 U. S. C. § 826. Nor does the case involve the attempt of a carrier to use a forwarder as a means of evading the regulations by which water carriers are controlled. By no such indirection can a carrier immunize itself against the Act's penalties. Compare *Lehigh Valley R. R. Co. v. United States*, 243 U. S. 444.

The case is this. The business of these appellees is to negotiate on behalf of shippers for shipping space and to make the necessary administrative arrangements for the carriage of goods. They have no part in the physical process of moving goods. They have no corporate, physical, or financial tie with the carriers. The sole question here is whether such business has been brought under the regulatory scheme of the Act. The Commission contends that they are "persons subject to the Act." If the Commission is correct, these forwarders would have to submit all sorts of agreements with carriers and with other forwarders to the Commission for approval (39 Stat. 733, 46 U. S. C. § 814), whereupon such agreements may be freed from the restrictions of the Sherman Law; they would be required to maintain uniform rates (39 Stat. 734, 46 U. S. C. § 815); they would be subject to the

Commission's supervision insofar as their activities involved practices pertaining to the handling and care of shipments (39 Stat. 734, 46 U. S. C. § 816); they would have to file reports and business records called for by the Commission (39 Stat. 736, 46 U. S. C. § 820); they would be subject to the Commission's power to award reparations for violations of the Act (39 Stat. 736, 46 U. S. C. § 821); and they would be liable to heavy penalties (39 Stat. 734, 736, 738, 40 Stat. 900, 902, 46 U. S. C. §§ 815, 820, 831, 839).

The Shipping Act has been on the statute books since 1916. Yet not until 1942 did the agency charged with the duty of enforcing the Act deem forwarders of this type to be covered by it. The scope of its legislation is, of course, for Congress to determine and not for the enforcing agency. Inaction, no matter how consistent and long-continued, cannot contract the reach of a statute. But much has properly been said about the important significance which attaches to the meaning given a statute by those whose duty it is to enforce it and who are deemed especially equipped to breathe life into inert language. Just as assumption of jurisdiction by an administrative agency for a long period of time goes a long way to prove that powers exercised were impliedly given, see *United States v. Midwest Oil Co.*, 236 U. S. 549, a consistent and unexplained failure to exercise power not obviously conferred by legislation may be equally persuasive that the power claimed was never conferred. It is not to be presumed that for decades officials were either ignorant of the duties with which Congress charged them or derelict in their enforcement.

A consideration of the language of the legislation in its proper setting makes it abundantly clear that the failure of the Commission and its predecessor for more than twenty-five years to exercise the authority which it now claims was due neither to ignorance nor to indifference. The explanation that would spontaneously occur to one for such administrative practice is, I believe, the right one: the power was not exercised because Congress did not grant it.

It is a fair generalization that Congress has never supplanted the forces of competition by administrative regulation until a real evil had, in the opinion of Congress, manifested the need for it. One turns in vain to the Congressional investigation which led to the Shipping Act, to the hearings on the bills which became

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that Act, to the reports on which it was based, to the experience under the Act since its inception, as reflected in the reports of the Maritime Commission and its predecessor the Shipping Board, for any indication that the business of independent forwarders, like those in this case, was so conducted as to make their regulation appropriate either to curb practices themselves inimical to the public interest or to render effective the regulation of water carriers.

The Commission's claim of jurisdiction must rest on construction of the phrase "business of forwarding . . . in connection with a common carrier by water." 39 Stat. 728, 46 U. S. C. § 801. Whatever the "business of forwarding" may here mean effect must be given to the qualifying phase "in connection with a common carrier by water." If it is left without any appropriate function unless these independent forwarders are covered, it must be applied to them. But if ample scope can be given to the phrase without attributing to Congress such a sudden assumption of authority over independent forwarders although no need for taking such control had been revealed, we should avoid undue extension of language as part of our duty to give fair meaning to what Congress has said.

Abstractly it may be argued that "forwarding" was intended to cover only those activities which included the physical transportation or movement of goods from one place to another. Cf. e. g., H.R. 9089, 9090, 9888, 76th Cong., 3d Sess. (1940); S. 3665, 3666, 4096, 76th Cong., 3d Sess. (1940). Support for such a restrictive meaning might be drawn from the fact that the "other persons" subject to the Act were those concerned with the physical handling of the goods. But such a construction would disregard the purpose of the statute. Again, the term may be said to cover only those businesses in which the forwarder assumes the liability for safe shipment of the goods from point of shipment to their destination. Cf. 56 Stat. 284, 49 U. S. C. Supp. IV §1002(a)(5)(B). Such a construction likewise does not harmonize with the aims of the statute. The most natural meaning of "forwarding" includes the business in which these appellees engage, namely, the rendering of administrative and brokerage services. Cf. H.R. Rep. No. 1682, 77th Cong., 2d Sess. (1942).

But Congress did not regulate "forwarders"; it regulated the "business of forwarding . . . in connection with a common

carrier by water." When, then, is forwarding "in connection with a common carrier by water"? That term may mean a business or financial connection; it may mean a physical connection, *i.e.*, the mutual handling of goods; it may mean both. Or it may mean any share in the process of offering of goods for water shipment. This last construction would mean that the restriction could have been included only for the purpose of excluding forwarders like these but concerned with shipment by rail. Such is the Commission's essential argument, that the phrase is merely a saving clause against its application to forwarders dealing with land carriers. To suggest that such a roundabout method was used for the purpose of saying that this statute was not impliedly intended as an amendment to the familiar Interstate Commerce Act, 24 Stat. 379, 49 U. S. C. § 1, amendments to which have always been designated as such, the administration of which was vested with a different Commission, the Interstate Commerce Commission, and the subject matter of which was completely distinguishable in the very titles of the statutes, is to attribute a fanciful abundance of caution, and less than common sense to the draughtsman. If every forwarder dealing with water carriers was to be covered by the Act, the obvious way of covering them would have been simply to say "forwarders" without qualification. The Commission really asks us to disregard the duty of courts to give effect to every phrase used by Congress. The construction which is now accepted means that "in connections with a common carrier by water" are perfectly superfluous words and are to be deleted.

Significance must be given to the qualification. What more reasonable than to hold that this phrase means those forwarders who are so closely tied to the business of the water carrier, by corporate, financial, or physical union, as to make regulation of them appropriate in order to control effectively the carriers with which they are affiliated? Such a forwarder is really a part of the process of carrying. Here the forwarders are closely connected not with the carrier but with the shipper.

That such construction respects Congressional purpose is reinforced by Congressional action regarding forwarders dealing with land carriers. When Congress, in 1942, first regulated such land-carrier forwarders, 56 Stat. 284, 49 U. S. C., Supp. IV, § 1001, forwarders, having the same functions in relation to land traffic as these appellees do in relation to water-borne traffic, "were not

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included. And yet it is argued that Congress thirty years ago asserted control over such forwarders concerned with water-borne traffic and forbade ordinary competition among them, though no basis in experience can account for such action by Congress.

*California v. United States*, 320 U. S. 577, involved a totally different situation. That case was concerned with wharves—facilities physically connected with water carriers. These were just as much the agents of the carrier as of the shipper; they formed an integral part of the carrier's business. As a matter of physical fact, the "connection" of these forwarders to a carrier is very different from the "connection" of wharf facilities to the carrier. Awareness of that fact was demonstrated by the specific omission, in the *California* opinion, of the term "forwarder" in considering whether port facilities were "connected" with water carriers. See *California v. United States, supra*, at 586. The difference in fact and in business relation between the forwarders' "connection" in this case, constituting merely an aspect of the shipper-carrier relationship, and the "connection" in the *California* case, which normally involves a close business tie with the carrier, is vital and should be observed in applying a section in which Congress dealt compendiously with various enterprises outside of, but related to, the regulated functions of water carriers.